



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 249 OF 2010**

**HBAO.....1<sup>ST</sup> PLAINTIFF**

**PFAD.....2<sup>ND</sup> PLAINTIFF**

**PAAO.....3<sup>RD</sup> PLAINTIFF**

**(Suing as the administrators of the estate of PLO-Deceased)**

**-VERSUS-**

**MARISONI TRADERS & FREIGHT CO. LTD.....1<sup>ST</sup> DEFENDANT**

**NILE STAR TRADERS.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By way of the plaint dated 11<sup>th</sup> May, 2010 and amended on 25<sup>th</sup> June, 2013 the plaintiffs herein instituted the suit against the defendants as administrators on behalf of the estate of PLO (*the deceased*).

2. The 1<sup>st</sup> defendant was sued in its capacity as the registered owner of the motor vehicle registration number KAX xxx at all material times whereas the 2<sup>nd</sup> defendant was sued as the registered and/or beneficial owner of the motor vehicle registration number KBG xxx Toyota Hiace at all material times.

3. The plaintiffs pleaded in their amended plaint that sometime on or about 4<sup>th</sup> October, 2009 while the deceased was travelling as a lawful fare-paying passenger along Kericho-Kisumu road in the motor vehicle registration number KBG xxx, the said vehicle collided with the motor vehicle registration number KAX xxx, causing the deceased to suffer fatal injuries.

4. The plaintiffs further pleaded that the aforesaid accident was the result of negligence on the part of both defendants in this instance and the particulars of negligence were laid out in their amended plaint, going further to aver that criminal charges were brought against the 1<sup>st</sup> defendant in relation to the accident before the Chief Magistrate's Court at Kericho.

5. It was also pleaded that the deceased is survived by the following dependants:

- (i) HBAO           Wife
- (ii) PFAD
- (iii) PAAO
- (iv) VO            Son aged 27 years
- (v) EO             Son aged 12 years
- (vi) YA            Daughter aged 10 years
- (vii) GA           Daughter aged 9 years

(viii) EO

Son aged 6 years

6. The plaintiffs further pleaded that at the time of his demise, the deceased was a healthy man aged 49 years and an employee of Co. Limited earning a monthly salary of Kshs.210,388.10/.

7. Consequently, the plaintiffs are seeking for the reliefs hereunder:

a) General damages

b) Special damages Kshs.26,075/

c) Costs of the suit

d) Interest on a) and b) above.

8. The defendants entered appearance and filed their joint statement of defence on 13<sup>th</sup> July, 2010 by and large denying ownership of the subject motor vehicles and further denying the occurrence of the accident or that the deceased was aboard the motor vehicle registration number KBG xxxx at the time of the alleged accident.

9. The defendants pleaded that in the alternative, if at all the accident occurred, then the same was wholly or substantially the result of negligence on the part of the deceased, the particulars of which were set out in their defence.

10. When the suit came up for hearing, the parties recorded a consent on liability in the ratio of 85%:15% in favour of the plaintiffs by way of the consent dated 13<sup>th</sup> October, 2016. During the said date, the suit against the 2<sup>nd</sup> defendant was equally withdrawn with no order as to costs.

11. In that case, the 1<sup>st</sup> plaintiff presented her brief evidence as the sole witness for the plaintiffs' case, stating that following the accident, she received a call and was urged to go to the mortuary to identify the deceased's body, which she did. The 1<sup>st</sup> plaintiff then went ahead to produce as evidence the documents constituting the plaintiffs' list and bundle of documents filed on 19<sup>th</sup> October, 2010 and marked as exhibits 1-8; and on 16<sup>th</sup> February, 2015 and marked as exhibits 9-19.

12. It was also the 1<sup>st</sup> plaintiff's testimony that she had a child with the deceased who was 29 years old when he died, adding that the remaining plaintiffs are her co-wives and that the other children listed as dependants in the amended plaint together with the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are their respective children. The 1<sup>st</sup> plaintiff testified that prior to his death, the deceased would support his listed dependants. At this point, the plaintiffs closed their case.

13. The parties subsequently proceeded to file written submissions on quantum. I have considered the same and note that the pending issue for determination before this court is that of assessment of damages.

14. I observed that the 1<sup>st</sup> defendant began its written submissions by arguing that since the plaintiffs did not plead that they are claiming damages under the Fatal Accidents Act and the Law Reform Act, they are not entitled to the same. In answer thereto, I have carefully considered that while it is true that the plaintiffs did not plead in their plaint that the general damages were sought under the aforesaid Acts, it has been established that they took out letters of administration and are seeking damages on behalf of the estate of the deceased. Further to this, the said Acts make provision for general damages for the benefit of the deceased's estate; I am therefore satisfied that this being a fatal accident claim, the estate of the deceased is entitled to receive compensation under the two (2) Acts.

15. In that case, I will address general damages for pain and suffering as well as loss of expectation of life as catered for in the Law Reform Act; followed by general damages for loss of dependency as provided for in the Fatal Accidents Act.

*a) Pain and suffering*

16. The plaintiffs, in proposing an award of Kshs.10,000/, submitted that the deceased died on the spot based on the testimony of the 1<sup>st</sup> plaintiff. However, I noted that the 1<sup>st</sup> plaintiff did not witness the accident and it therefore remains unclear whether the deceased died on the spot or soon thereafter. Nonetheless, I have considered the evidence given by the 1<sup>st</sup> plaintiff that she went to view the deceased's body at the mortuary. I have equally considered the 1<sup>st</sup> defendant's proposal for a similar award of Kshs.10,000/. In that case, I find the award of Kshs.10,000/ to be reasonable.

*b) Loss of expectation of life*

17. Under this head, the plaintiffs urged this court to award the sum of Kshs.100,000/, citing the case of *Samwel Kimutai Korir (suing as personal and Legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School) & another [2016] eKLR* where a similar award was made. On its part, the 1<sup>st</sup> defendant proposed an award of Kshs.80,000/ while relying on the appeal case of *Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma-Deceased) [2019] eKLR* where a similar award was made by the High Court.

18. I have taken into account the respective proposed awards and wish to mention that the awards made under this head vary depending on

the unique circumstances of each case such as the age of the deceased at the time of his or her death. On my part, I will award a conventional figure of Kshs.100,000/.

c) *Loss of dependency*

19. In considering the appropriate award to make under this head, I am required to take into account certain factors. These were aptly articulated in *Avtar Singh Bhabra & another v Geoffrey Ndambuki [2014] eKLR* as follows:

**“In assessing loss of dependency under the fatal Accidents Act the principles on which damages should be assessed is set out in the case of Radhakrishen M Khemaney v Mrs Lachaba Murlindar [1958] EA 268 where the Court of Appeal held that, “in considering the award of damages under the fatal accidents Act the court should ascertain the age, expectation of working life, wages and expectations of the deceased and what proportion of his net income the deceased would have made available for his dependants from which the annual value of the dependency would be calculated ,the annual sum should then be capitalised by multiplying it by a sum representing so many years ,purchase, having regard to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children .....” ”**

20. As concerns the *multiplier*, the death certificate tendered before this court confirmed that the deceased was aged 49 years at the time of his death. The plaintiffs urged this court to apply a multiplier of 11 years given that the deceased was working as a civil servant and hence his retirement age would have possibly been 60 years. In submitting so, they cited the case of *Margaret Wanjiru Wanjiri & another v Isaac Thumbi Gitau & 2 others [2017] eKLR*. On his part, the 1<sup>st</sup> defendant proposed a multiplier of 7 years taking into account the current life expectancy rate in the country; the case of *Leonard O. Ekisa & another v Major K. Birgen [2005] eKLR* was relied upon in this regard.

21. I have taken the parties’ respective positions as well as the cited authorities into consideration; it is noteworthy that the authority of *Leonard O. Ekisa & another (supra)* cited by the 1<sup>st</sup> defendant was decided over 10 years ago and was based on the retirement age of 55 years for civil servants at the time. On a similar note, I have evaluated the testimony of the 1<sup>st</sup> plaintiff that the deceased worked with the civil service at the time of his death though no documentary evidence was availed to support that fact. Be that as it may, I am able to determine from the pay slip availed in court as evidence that the deceased was in formal employment at the time of his demise.

22. Further to the above, I have similarly considered the approach taken in the more recent case *Leonard Nturibi Ambutu & another v Rufus J K Kihato & another [2018] eKLR* where the court applied a multiplier of 12 years for a deceased who was 48 years old at the time of his death; I find this particular case to be comparable with the case of *Margaret Wanjiru Wanjiri (supra)* cited by the plaintiffs. In the circumstances and considering the vagaries of life, I am persuaded that a multiplier of 11 years is reasonable.

23. On the *dependency ratio*, the plaintiffs proposed a ratio of 2/3 on the premise that the deceased was survived by the plaintiffs as his three (3) wives and five (5) children, 3 of whom were minors. The plaintiffs further submitted that all the dependants were supported by the deceased prior to his death. In its submissions, the 1<sup>st</sup> defendant equally proposed a dependency ratio of 2/3.

24. Going by the evidence adduced before this court, I noted that save for the 1<sup>st</sup> plaintiff’s testimony as to the number of dependants of the deceased and the marriage certificate evidencing her marriage to the deceased, no other documentary evidence was tendered in support of her testimony. Nevertheless, it is apparent that the issue of the dependants of the deceased was in no way rebutted by the 1<sup>st</sup> defendant, neither has it been controverted that the deceased supported his dependants. In view of the foregoing, I will apply a ratio of 2/3.

25. As relates to the multiplicand, the plaintiffs argued that at the time of his death, the deceased was earning a salary of Kshs.210,388.10/ as an engineer. On its part, the 1<sup>st</sup> defendant submitted that Kshs.210.388.10/ was the deceased’s gross income, thus urging this court to instead apply his net income of Kshs.69,360/.

26. I have looked at the deceased’s pay slip for the month of September, 2009 produced before this court. The same confirms that he worked as a 2<sup>nd</sup> Assistant Superintendent at all material times, earning a gross salary of Kshs.210.388.10/. It is noteworthy that the said salary was subject to statutory and other deductions as indicated in the pay slip, thereby bringing the same to Kshs.69,360/. In the circumstances, the net income of Kshs.69,360/ would be the applicable multiplicand.

27. In that case, the damages for loss of dependency are tabulated as follows:

$69,360 \times 11 \times 12 \times \frac{2}{3} = 6,103,680/$

d) *Special damages*

28. Under this head, the plaintiffs sought for the sum of Kshs.26,075/ whereas the 1<sup>st</sup> defendant submitted that the plaintiffs had only pleaded and proved Kshs.1,000/.

29. It is trite law that special damages ought to be both specifically pleaded and strictly proved. I have evaluated the evidence adduced in court and come to the finding that the plaintiffs only pleaded and proved the sum of Kshs.3,000/ indicated as the amount paid in the Invoice marked as *P. Exhibit 11* and Kshs.1,000/ as payment for the copy of records for the subject motor vehicles marked as *P. Exhibits 12 and 14* respectively. This totals Kshs.4,000/.

30. Consequently, I hereby award damages in favour of the plaintiffs as follows:

(i) General damages	
a) Pain and suffering	Kshs.10,000/
b) Loss of expectation of life	Kshs.100,000/
c) Loss of dependency	Kshs. 6,103,680/
(ii) Special damages	Kshs.4,000/
TOTAL	Kshs.6,217,680/
Subject to 15% contribution	<b>Kshs.5,285,028/</b>

The plaintiffs shall also have the costs of the suit and interest on special damages from the date of filing of the suit while the general damages shall earn interest from the date of judgment until payment in full.

**Dated, signed and delivered at NAIROBI this 3<sup>rd</sup> day of October, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the 1<sup>st</sup> Defendant