



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 18 OF 2009

MIRIAM MUTHONI KAGIRA AND JOSEPH GITAU (Suing as the

administrators of the estate of the late JOHN KAGIRA GITAU)....PLAINTIFF

VERSUS

1. KENYA FOREST SERVICE.....1ST DEFENDANT

2. HARUN OBIRI MASESE.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiffs instituted this case as the administrators of the estate of John Kagira Gitau via a Plaint dated 14th December, 2009. It is averred that on or about 5th December, 2008, the second Defendant fatally shot the deceased John Kagira Gitau at Kireita Forest, Lari Division, Kiambu West District. That the shooting was unprovoked and the second defendant did it because he was demanding a bribe from the deceased, which funds the deceased was not in a position to supply immediately. It is averred that the deceased left six children and two parents who were dependent on him.

2. The Defendants filed a Defence dated 4th March, 2010 and denied any shooting in totality and without prejudice contended that if the shooting occurred as alleged, the Defendants are not legally liable for the shooting as the 2nd Defendant was acting within the statutory limits of the Forests Act, 2005, pursuant to which he was employed and carried out his duties. It is averred that the 2nd Defendant used the firearm in self-defence as the deceased together with 2 others had machetes and attacked him.

3. On 29th January, 2018, when the matter was scheduled for hearing, the Defendants' Counsel was not ready to proceed and the Court granted the last adjournment and stood over the matter to 19th March, 2018, when the suit proceeded in the absence of the defendants who failed to attend court. The Plaintiff called four witnesses in total. **DAVID GICHUKA MWENJARA** testified as **PW1** and adopted his witness statement filed on 8/7/2016. He is the eye witness who told the court how the deceased, Moses Ngugi Gichuhi and himself used to take their cows for grazing at Kereita Forest and would pay the rangers to allow them to graze the cattle in the forest.

4. On the fateful day, 5th December, 2008, PW1 stated that the three of them met at Kimende market since they had been informed by the 2nd Defendant whom they only knew as Masese that their 4 cattle had been captured and Masese wanted Kshs. 4,000 in order to release the cows. The aim of their meeting was to raise the money. Among the captured cows, two belonged to the deceased, one to himself and the other to Moses Ngugi. PW1 told the court that the deceased only managed to raise Kshs. 1,000 and they resolved to go and see the 2nd Defendant and convince him to take the Kshs. 3,000/=. PW1 stated that on reaching Kereita station, they found Masese and gave him the Kshs. 3,000/- but he insisted on the extra Kshs. 1,000/=. That the deceased pleaded with him and after some negotiations, Masese agreed to release the cows in exchange with the Kshs. 3,000/=-.

5. PW1 testified that they left with the 4 cows and as they did, Moses was ahead with the cows whereas the deceased and himself dragged behind while chatting. After walking for half a kilometer, they were stopped by the 2nd Defendant who appeared to have been running after them. He started shouting and demanding the extra Kshs. 1,000/=- and threatening to shoot the deceased. That he became agitated and the deceased raised his hands and pleaded with him but his pleas not withstanding, the 2nd Defendant pointed his gun at the deceased and shot him. It was PW1's evidence that at that moment of shooting he was with the deceased and Masese and that the deceased did not have any weapon. After a while, PW1 saw another ranger with a gun approaching and he feared for his life and started running, Masese shouted at him to stop running but he did not. He caught up with Moses and explained to him what had happened. Moses advised that they find a place to hide as the two rangers were following them and they did not know what to do. They both hid in the forest over night and left at dawn.

6. The 2nd witness **MOSES NGUGI GICHUHI (PW2)** testified and corroborated the line of events as testified by the PW1. It was his evidence that he walked ahead with the cows and after one kilometer he got out of sight of his two colleagues. After a while he heard a loud bang from what sounded like a gunshot but he ignored. It is after sometimes that he saw David running out of breath and frightened. He testified that PW1 explained that the deceased had been shot by Masese and they therefore got a place to hide. They saw the two rangers

looking for them and hid till the following day .

7. The deceased's widow **MIRIAM MUTHONI KAGIRA** testified that on the fateful day the deceased left at around 4 pm after having been called by rangers to go and look for cows but he never returned. She told the court that the deceased left her with 6 children who were all minors at the time of his death. She produced 6 birth certificates for the said children. She stated that she relies on well-wishers and requests help from the court to be awarded damages.

8. The deceased's father **JOSEPH GITAU**, testified as **PW4** and told the court that on the fateful day he had been in the shamba putting fertilizer and they stayed with the deceased till afternoon when the deceased left and he got the impression that the deceased had gone to church only latter to learn that he had gone to Kereita and had been shot. He stated that his son was a law abiding citizen and prays that the family be compensated as they are suffering. He produced the grant of letters of administration, death certificate, post mortem report and the demand letter.

9. At the end, the Plaintiffs filed written submissions dated 17th April, 2018. It was submitted that the circumstances surrounding the shooting were more of an execution than attempted arrest. The Plaintiffs submitted that the gunshot wounds were on the left side of the chest. It was also submitted that the Defendants did not show up on the hearing date despite the hearing date having been taken in court in their presence. The Plaintiffs urged the court to find the defendants 100% liable.

10. The Plaintiffs also submitted on the quantum of damages . Under Law Reform Act, it was submitted that the damages for pain and suffering should be awarded to the tune of Kshs. 50,000/=. The Plaintiff cited the case of **Benard Karanja & another v Justina Mutio Kavita & another [2017] eKLR** where the court held that , “ *The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the award ranges from Kshs. 10,000 to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death*”.

11. On loss of expectation of life, it was submitted that the deceased died at the age of 36 years and the plaintiffs propose a figure of Kshs. 150,000 and relied on the **case of Benard Karanja** where the court awarded Kshs. 120,000/=.

12. On loss of dependency, it was submitted that the deceased was doing well in his farming business to be capable of supporting the number of children he had. The Plaintiffs cited the case of **Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749**, where the Court of Appeal stated the law on assessment of damages under the Fatal Accidents Act that:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power 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. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. ...”

13. The Plaintiff therefore proposed that the deceased could be earning the sum of Kshs. 30,000/= per month and submitted that being a farmer there is no specific retirement age and he would have worked upto the age of 65 years and a multiplicand of 29 years was proposed. The Plaintiff urged the court to award Kshs. 6,960,000/= (30,000*12*29*2/3)

14. I have considered the pleadings , the evidence on record, the submissions by the counsel for the Plaintiffs and the authorities cited in support of the quantum of damages.

15. The Plaintiffs have given a chronology of the events surrounding the death of the deceased herein. From the evidence tabled before the court, it is evident and infact it is not denied that the 2nd Defendant actually shot the deceased. The post mortem report indicates that he died due to multiple gun injuries with bilated lung injuries. For the 2nd Defendant to shoot the deceased at the chest, it is clear that he had the intention of killing him. The Defendant did not call witnesses to controvert the evidence adduced by the Plaintiffs. The burden of proof in a civil case is that the Plaintiff must prove his case on a balance of probability. It is trite law that when a person is bound to prove the existence of any fact, the burden of proof lay on that person. Furthermore, whoever desires any court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist . See Section 107 of the Evidence Act Cap 80 Laws of Kenya.

16. From the evidence tabled before court, I am convinced that the Plaintiffs have proved their case on a balance of probability. The 2nd Defendant was employed by the 1st defendant and it has been averred in the defence that he was in the course of duty when the shooting occurred. I therefore hold the 1st defendant vicariously liable for the fatal shooting. The Defendants are to blame 100% for the death of the deceased.

17. On damages, the law is clear that the assessment of damages is a matter within the discretion of the trial judge which discretion is to be exercised judiciously. In doing so, courts will normally make reference to similar decided authorities.

18. In **Patel M. Kariuki vs Attorney General (2014) e KLR** the court acknowledged that the assessment of damages is a matter of judicial discretion for the trial court, which must be exercised judiciously and with regard to the general conditions prevailing in the country and to prior relevant decisions.

19. In this case, it is not disputed that the deceased died following the fatal shooting and PW1 testified that the deceased died almost immediately after the shooting. That being the case, it can safely be concluded that the deceased did not suffer for a long time and I therefore award the plaintiffs a sum of KShs 10,000/- for pain and suffering.

20. On loss of expectation of life, I award the plaintiff KShs 100,000 being a conventional figure based on the authority of **Benard Karanja (Supra)**.

21. On the claim under the Fatal Accidents Act, the deceased left behind a wife, six children and the two parents. On record are six birth certificates for the children. The children, widow and parents are dependants under section 4(1) of the Fatal Accidents Act which provides that:

(a) "every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused.."

22. On the claim for loss of dependency, the manner of assessment of damages under the Fatal Accident's Act was set out in **Chunibhai J Patel and Another vs PF Hayes and Others (1957) EA 748, 749** where the Court of Appeal stated that:-

" The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased ie his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants."

23. In this case, the plaintiffs pleaded that the deceased was aged 36 years, enjoyed good health and doing well in the farming business and earning approximately KShs. 30,000/= per month. Even though there was no evidence that the deceased was earning the said income from farming business, this court cannot make a finding that he was not providing a livelihood. In the case of **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR** the Court of Appeal observed that;

"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

24. In dealing with a similar situation in the case of **Innocent Keti Makaya Denge v Peter Kipkore Cheserek & another [2015] eKLR** the Court held that, *"Turning to the multiplier, my analysis of the evidence shows that the deceased died at the young age of 34 years. He was a businessman which means that his working life was not dependent on any prescribed retirement age. There is evidence that he was in good health prior to the accident. He would thus have continued with his business and would have continued earning probably upto about 60 years of age given the kind of business he was engaged in and the vagaries of life. The multiplier of 26 years adopted by the trial magistrate was in the circumstances not unreasonable. The same is upheld."*

25. The deceased died at the age of 36 years as evidenced from the death certificate and as testified, he used to provide for his six children and wife. No evidence was placed before the court to support the monthly income of KShs. 30,000. In such a case it will be just and reasonable to apply the minimum wage of KShs 8,171 which was applicable at the time of the deceased's death.

26. Factoring in the number and ages of the dependants left behind, I would give 2/3 of his earnings to the support of the deceased's direct dependants named and listed in the plaint.

27. Based on the above authorities, submissions and legal principles, I would award a multiplier of 24 years. The deceased would have probably done farming upto the age of 60 years. Loss of dependency is therefore calculated as follows $8,171 \times 24 \times \frac{2}{3} \times 12 = 1,568,832$

Pain and suffering	10,000
Loss of expectation of life	100,000
TOTAL	1,678,832

28. The general damages shall attract interest from date of judgment until payment in full.

29. The plaintiffs shall also have costs of the suit.

Dated, Signed and Delivered at Nairobi this 7th Day of June, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

.....For the Applicant

.....For the Respondent