



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 139 OF 2009**

**D K M (Suing as Legal Representative**

**to the Estate of J M M – Deceased).....PLAINTIFF**

**VERSUS**

**MEHARI K. TOWOLDE.....DEFENDANT**

**JUDGMENT**

1. The plaintiff herein filed this suit relating to a fatal accident which occurred on the 15<sup>th</sup> of May, 2006 involving motor vehicle Registration No. KAE 724E Mercedes Benz lorry/truck (belonging to Mehari Towolde herein the defendant) and motor vehicle Registration No. KAG 754B.
2. The plaintiff obtained Letters of Administration ad litem to act in respect of the deceased's estate. The plaintiff filed suit seeking general and special damages under the Law Reform Act and the Fatal Accidents Act, and costs and interest of the suit.
3. The deceased was travelling as a fare paying passenger aboard motor vehicle registration no. KAG 754B when she was involved in an accident along Mombasa-Nairobi road at Kenchic area in Athi-River. The plaint reads as follows:

**“PLAINT**

1. The plaintiff herein is a male adult Kenyan of sound mind and disposition and bring this suit as the legal representative to the estate of J M M – deceased under the Law Reform Act and Fatal Accidents Act (Laws of Kenya) and their address of service shall be care on M/S Annie W. Thoronjo & Co. Advocates, Kitanga House. 1<sup>st</sup> Floor, P.O Box 2493, Machakos.
2. The defendant is a male adult Kenyan of sound mind and disposition, residing and working for gain in the afore said Republic and his address of service for the purpose of this suit is care of P.O Box 59668, Nairobi.
3. At all material times relevant to this suit the Defendant was the sole registered owner of M/V Reg. No KAE 724 E.
4. On or about 15/5/2006 the deceased was lawfully traveling as a fare paying passenger aboard M/V Reg. KAG 754 B along Mombasa – Nairobi road when at Kenchic in Athi River M/V Reg. No KAE 724 E was so negligently and or recklessly driven, managed and or controlled by the defendant himself and or through agent, driver and or servant that it was allowed to lose control, veer off the road and violently collide into M/V Reg. No. KAG 754 B thereby occasioning her fatal injuries.

**PARTICULARS OF NEGLIGENCE TO THE DEFENDANT AND / OR HIS AUTHORISED AGENT AND / OR DRIVER.**

- a) Driving at a speed that was dangerous and excessive in the circumstances.
- b) Driving carelessly and recklessly without due care and attention to other road users and especially passengers on M/V Reg. No. KAG 754 B.
- c) Failing to take into any and or/ any sufficient steps to avoid the accident
- d) Driving into the path of M/V Reg. No KAG 754 B.
- e) Failing to brake, swerve, slow-down and / or act in any other manner to manage and / or control the said M/V so as to avoid causing the accident.

5. The plaintiff brings this suit under the Law Reform Act and the Fatal Accidents Act.

**Particulars pursuant to the statute**

The deceased was aged 36 years old at the time of her death. She was in good health and a doctor earning a salary of Ksh.59, 000/= per month and is survived by the following:

- a) D K M – Husband
- b) M W - daughter 14 years
- c) V N – daughter 7 years
- d) V K – son 7 years
- e) V M – son 7 years

The dependants have suffered much loss and damage due to the death of the deceased.

**Particulars of damages**

- a) Police abstract – Ksh. 200/=
- b) Death certificate – Ksh 50/=
- c) Letters of administration – Ksh 1,075/=
- d) Funeral expenses – Ksh. 64,728/=
- e) Motor vehicle search fee – 500/=
- f) Mortuary fee – Ksh.8,300/=

Total Ksh.74, 855/=

6. Despite demand and notice of intention to sue having been duly given the defendants has refused, failed, neglected and / or ignored to make good the plaintiff's claim

7. The plaintiff avers that there is no other pending suit and / or that there have been no previous proceedings in any court between the plaintiff's and the defendants touching on the same subject matter.

8. The cause of action arose with the honourable court's jurisdiction.

Plaintiff prays for judgment against defendant for:

- a) General damages
- b) Special damages Ksh.74,855/=
- c) Costs and interests of this at court rates.”

**Liability**

4. Parties entered into a consent on liability in the ratio of 70:30 in favour of the Plaintiff as against the defendant.

**SUBMISSIONS**

**Plaintiff's Submission**

5. The plaintiff submitted as hereunder:

“The plaintiff's claim is one of compensation for fatal injuries occasioned to the deceased on or about 15/05/2006 when at Kenchic Areas. M/V Reg. KAE 742 E was so recklessly, negligently and or though carelessly driven, managed and or/ controlled by the defendant himself and or through his authorise agent, servant and or driver that this allowed to lose control and violently collide

into M/V Reg. No. [KAG 754 B].

Liability

Liability was recorded on consent in the ration of 70:30 in favour of the plaintiff as against the defendant.

Quantum

a) Loss of expectation of life

Parties recorded consent awarding the plaintiff an amount of Ksh.100, 000/=

b) Pain & suffering

Parties recorded consent awarding plaintiff an amount of Ksh.10, 000/=

c) Loss of dependency

The plaintiff was aged 36 years and was on good health. She had dependants a husband and children and was a medical Doctor employed with the Ministry of Medical Services earning Ksh.56, 235/= per month. We submit for loss of dependency as follows:

$56,235/= \times \frac{2}{3} \times 12 \times 20 = 8,997,600/=$

We rely on the following authorities:

NAIROBI HCCC NO. 1299/1998 **Elijah Ole Kool v. George Ikonya Thuo** the court adopted a multiplier of 20 years the deceased was aged 36. General damages was awarded Ksh.300, 000/=

HCCC NO. 3150 of 1984 **Eunice Ruguru Njenga v. Ngángá Njau & others** the court adopted a multiplier of 20 years, the deceased was aged 35.

Further we rely on the deceased's husband's statement on dependency filed herein in support of dependency ration.

6. The dependency ratio of  $\frac{2}{3}$  was urged by the plaintiff is as follows:

“Plaintiff's Statement on dependency Ratio

I D M M of P.O Box No. 90100, Machakos, do hereby state as follows:

a) That I am the husband to the deceased J M M and the Plaintiff in these pleadings.

b) That the deceased was aged 36 years at the time of her death and earnings salary of Ksh. 56,235/=

c) That at the time of her death we were blessed with four children as follows:

i) M W – daughter born on 12/10/1996

Triplets namely

ii) V N – Daughter born on 6<sup>th</sup> May, 2002

iii) V K – son born on 6<sup>th</sup> May, 2002

iv) V M – son born on 6<sup>th</sup> May, 2002

d) That give the fact that it is quite expensive raising the four children, we suffered much loss and damage due to her death. The deceased was helping me to support the family and had committed most of her earnings to the upkeep of the children and had she lived would have committed to do so.

e) The deceased was assisting in paying the school fees for the children, who were then in school and are still attending school to date as well as attending other needs such as food and clothing and therefore out of her salary of Ksh.56,235/= she was pending about  $\frac{2}{3}$  on the family which is about Ksh.38,000/=.

f) That the deceased was a Doctor employed with the Ministry of Medical Services and was pursuing her Masters at the University

of Nairobi when she met her death. She would therefore have been promoted at her job and would have been earning much more if not for the cruel hand of death that took her away.

g) That the children were of young and tender age when they lost their mother and have missed out on the care and guidance she would have provided for the family.

### **Defendants Submission**

7. The defendant urged the court to adopt the consent on loss of expectation of life agreed by the parties. However, they defendant urged the court to use the ratio of 1/3 urging the court that the deceased's husband was employed and that the net salary of the deceased was in contrast of the payslips annexed as follows:

#### **“Quantum**

a. **Pain and Suffering** – parties had agreed at Ksh 10,000 as sufficient compensation.

b. **Loss of expectation of life** – parties had agreed on Ksh 100,000 as adequate compensation.

c. ...

d. **Loss of dependency**

*The deceased was aged 36 years at the time of her death. The plaintiff alleges that she earned Ksh.56, 235/= per month. However, according to the annexed payslips, the deceased had a net salary of Ksh.28, 726/=. We submit the court must be guided by the same. On the issue of dependency ratio, we submit that the court should use a ratio of 1/3 because the deceased her family because her husband was also employed.*

8. The defendant relied on MACHAKOS CIVIL NO. 124 OF 2014 ***Elizabeth Muthoka v. Martin Musila Muthoka*** urging the ratio of 1/3 as both the deceased and the plaintiff who was his wife used to work for a living. Court stated that the deceased's wife had income and was not totally dependent on the deceased and therefore a 1/3 ratio is properly applicable in this case.

Further in ***Robert Gitau Kanyiri v. Charles Kahiga & 2 others*** [2010] eKLR where the plaintiff was aged 36 years, the court used multiplier of 15 years.

### **ISSUES FOR DETERMINATION**

9. The court has referred to the plaint, defence and the submissions and has framed the following issues for determination. as Liability had been agreed by the parties:

a) What amount of damages is to be awarded under the Law Reform Act and the Fatal Accidents Act, in the circumstances of this case?

### **DETERMINATION**

#### **Dependency Ratio**

10. The plaintiff pleaded for the dependency ratio of  $\frac{2}{3}$  to be used to award damages because of the shared responsibility towards their children and the family where in this case both the deceased and the plaintiff were working. A total of Ksh.8, 997,600/= was suggested by which was challenged by the defendant urging the court to use the net salary of the deceased which was Ksh 28,726.

11. The principle in ascertaining the ratio of dependency is  $\frac{2}{3}$  of the net salary as it is presumed that  $\frac{1}{3}$  of the salary is owned and the  $\frac{2}{3}$  dependent by others. However, in some instances courts have established that in the case where both spouses were working both make a contribution of  $\frac{1}{3}$  and in the case one spouse is working and the sole provider of the family a dependency of  $\frac{2}{3}$  is applied. The case in ***Elizabeth Ngina***, supra, the court adopted a ratio of  $\frac{1}{3}$  since both the deceased and wife were working and the court held that the wife was not wholly dependent on the deceased. The plaintiff stated that the deceased used to help in payment of school fees and meeting other needs for the family, however, the court is unable to make an estimation of how much the deceased contributed to the family. The ratio of  $\frac{1}{3}$  is reasonable in the circumstances as both spouses were working.

#### **Multiplier**

12. The other issue for determination is the multiplier. The deceased was 36 years as shown in the death certificate. She had died in the year 2006 and the retirement age is 60 years. The defendant urged the court to use a multiplier of 15 years whereas the plaintiff urged a multiplier of 20 years. The deceased would have worked for another 24 years. However, given the unforeseeable vicissitudes of life, it is fair to tabulate the damages with a multiplier of 20 years. The court refers to ***Elijah Ole Kool v. George Ikonya Thuo*** [2001] eKLR where the deceased was 36 years and a multiplier of 20 years was used. The court will adopt a multiplier of 20 years.

13. The plaintiff had urged the court to use a multiplicand of Ksh.56,235 which was the gross pay. The payslip annexed shows there were some deductions and the defendant urged the court to use the net salary of Ksh.28,726. The letter from the Ministry of Medical Services showed total earnings as Ksh.56,235. The net pay for February 2005 indicates Ksh. 29578 as net salary. The court cannot calculate the loss of dependency based on the total pay as the deductions do not necessarily go to the benefit of the dependants. The court adopts Ksh.29,534 as per the multiplicand.

**Special Damages**

14. On Special Damages the Plaintiff prayed for Ksh.74,855. It is trite law that Special Damages must be specifically pleaded and proved. The Plaintiff produced receipts for the amount claimed. The court shall award Ksh.74,855 since it is also not disputed by the defendant.

**Quantum of Damages**

15. Accordingly, for the reasons set out above and taking into account the consent on Liability, I enter judgment in favour of the Plaintiff against the defendant as follows:

a. *Liability – 70:30 in favour of Plaintiff as against the defendant.*

b. *Loss of dependency*

$29,578 \times \frac{1}{3} \times 20 \times 12 = \text{Ksh } 2,366,240$

c. *Loss of expectation of life*      100,000

d. *Pain and Suffering*                      10,000

e. *Special Damages*                      74,855

**2,551,095**

*Less 30%*                                      765,328.50

*Total*    **1,785,766.50**

f. *Costs of the Suit and Interest thereon.*

**Order accordingly.**

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 2018**

**G.V. ODUNGA**

**JUDGE**

**Appearances:**

1. M/s Annie W. Thoronjo & Co. Advocates for the Plaintiff.

2. M/s Manthi Masika & Co. Advocates for the Defendant.