



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 162 OF 2009

**CATHERINE NDUTA NGARACHU suing as personal and legal representative of Estate of
NASHON KURIA NGARACHU(DECEASED).....
.....PLAINTIFF**

VERSUS

PETER GITAU NJONDE.....1ST DEFENDANT

SOUTHERN CREDIT BANKING CORPORATION LTD.....2ND DEFENDANT

JUDGMENT

1. **CATHERINE NDUTA NGARACHU**, the plaintiff herein, is the mother of **NASHON KURIA NGARACHU** (deceased). She filed this suit on 14th August, 2009 in her capacity as the administratrix of the estate of the deceased to claim damages for the benefit of the deceased's estate under the **Law Reform Act, Cap 26 Laws of Kenya** and for her benefit as the sole dependant of the deceased under the **Fatal Accidents Act Cap 32 Laws of Kenya**.

2. The plaintiff's case was that on 3rd October 2008 at about 5.30 p.m., the deceased was walking on the verge of Isebania – Nyamataburo road when near Nyangita Market, the defendants driver, servant and/or agent drove the defendant's motor vehicle registration number KAV 273S, ISUZU FRR Lorry, (hereinafter "the suit Motor Vehicle) so recklessly and negligent thereby permitting it to knock down the deceased who sustained fatal injuries.

3. The plaintiff pleaded the particulars of negligence and stated that the deceased was aged 23 years at the time of his death and was in good health. The plaintiff pleaded that she was the sole dependant of the deceased.

4. The defendant's defence filed on 16th September 2009 consisted of a denial of the plaintiff entire claim including the ownership of the suit motor vehicle. The defendants attributed the accident to the negligence of the deceased and also pleaded particulars of negligence.

5. On 7th October 2009, the plaintiff filed a reply to defence in which she reiterated the contents of the plaint and denied the allegation that the accident was caused by the deceased's negligence.

6. On 30th November 2009, the plaintiff testified as PW1 and produced the following documents in support of her case:

a) Letters of administration ad litem Pexh. 1.

b) Police abstract – Pexh. 2

c) Post mortem report – Pexh. 3

d) Death certificate- Pexh. 4

e) Copy of records – Pexh. 5

f) Demand letter – Pexh. 6

7. The plaintiff added that she was a widow having lost her husband in 1990 and therefore the deceased used to support her financially and would send her Kshs. 3000/= every month for her upkeep. She stated that the deceased was unmarried. On cross examination, she stated that the deceased was employed as a sales assistant, but she did not know how much salary he earned per month.

8. PW2 PETER KARUNGU NGARACHU, the deceased's older brother was with the deceased at the time of the accident. He testified that he lived together with the deceased in the same house as at the time of the accident and that on the material day, they were walking along Isebania-Nyamataburo Road when a vehicle came from behind and hit the deceased who was walking close to the road. PW2 escaped the accident by jumping off the road where he fell down and lost consciousness. He blamed the driver of the suit motor vehicle reg. No.KAV 273S for the accident while stating that the deceased was walking off the road on the left side but the motor vehicle was being driven on the wrong side of the road and added that the driver did not hoot to warn them of his approach. He contended that the driver of the suit motor vehicle ought to have seen the deceased because visibility was clear. He produced receipt for purchase of coffin at Kshs. 14,500/= as Pexhi 7 and stated that the deceased's family spent Kshs. 24,000/= for transport of family members, Kshs. 26,000/= to transport the body to Muranga, Kshs. 100/= for police abstract, Kshs. 20,000/= for food.

9. His testimony was that the deceased earned between Kshs. 7000/= to 8000/= per month out of which he would send between Kshs. 2,500/= to 3000/= to their mother (PWI).

10. The plaintiff closed her case on 21st June 2010 after the testimony of PW2, after which the case was fixed for defence hearing on several occasions when the defence did not present its case and on 3rd October 2016, this court rejected the defendant's application to further adjourn the case whereupon, the defence closed its case and parties thereafter agreed to present their written submissions before judgment.

11. I have considered the evidence on record and the parties' written submissions together with the authorities that they cited. The plaintiff's testimony that the deceased was a pedestrian walking along Isebania – Nyamataburo road when the accident occurred has not been controverted. The deceased was in the company of his brother PW2 who survived the accident narrowly by jumping off the motor vehicles way in a split second but his brother, the deceased was not so lucky. I believe the testimony of PW2 that he was walking with the deceased when the defendant's motor vehicle knocked down the deceased thereby causing him the fatal injuries. Indeed, the fact that the deceased and PW2 were about 1 meter off the road at the time of the accident shows that the defendant's motor vehicle left its path on the road and knocked the deceased. I find that in the premises, the motor vehicle was being driven carelessly and the 2nd defendant is therefore vicariously liable for the negligence of the 1st defendant who according to the police abstract produced by the plaintiff as Pexhibit 2 was the driver of the suit motor vehicle. I also find that the driver of the motor vehicle owed a duty of care to other road users and had the opportunity to stop, slow down, swerve or in any other way steer or control the suit motor vehicle so as to avoid causing the accident. In the circumstances, I assess liability at 90% against the defendants.

12. I am satisfied that the plaintiff established that she is the mother and the administratrix of the estate of the deceased and is therefore competent to institute the suit under both the **Law Reform Act and Fatal Accidents Act** for the benefit of the deceased's estate and herself as the sole dependant.

13. As regards the deceased's income, the plaintiff's evidence and that of PW2 was that the deceased was

engaged in hawking/sales assistant business from which he earned between Kshs. 7000 to 8000/= per month. I accept the plaintiff's evidence on the deceased's earnings while taking judicial notice of the fact that most Kenyans and especially the youth earn their living from informal sector in which they have no payslips and do not maintain written records of earnings. Even where such people in the informal sector are employed, it is not common for their employers to issue them with letters of appointment or payslips.

14. I similarly believe the plaintiff's evidence that the deceased supported her by sending to her between Kshs. 2500/= to 3000/= per month.

15. On assessment of damages, the deceased's estate is entitled to damages under Law Reform act for pain and suffering, loss of expectation of life and funeral expenses. Additionally, the deceased's estate will also be entitled to damages under fatal accidents act, but in making an award under the Fatal Accident Act, the damages already awarded under the Law Reform Act must be taken into consideration in order to ensure that the deceased's beneficiaries do not benefit twice from the same accident.

Damages under Law Reforms Act.

(i) Pain and suffering

16. The post mortem report produced as Pexhibit 3 shows that the deceased died on the same day of the accident being 3rd October 2008. There was no evidence to show that the deceased was taken to hospital before he died and it is therefore likely that he died instantly. Courts have however held that even where a deceased dies on the spot, he must have undergone some pain and suffering before succumbing to the injuries. I will in the circumstances make an award of Kshs. 10,000/= for pain and suffering.

Loss of expectation of life

17. The deceased, then aged 23 years, was deprived of normal expectation of life because of the negligence of the 1st defendant. The plaintiff proposed an amount of Kshs.100, 000/= under this heading while the defendant proposed Kshs. 70,000/= while relying on the case of **Alexander Okinda Anagwe vs Reuben Muriuki Kahuha, City Hopper Ltd, Michael A Graig & Reuben Kamade Mburu [2015] eKLR** in which an award of Kshs. 100,000/= was made in respect of the deceased who was aged 25 years at the time of his death. I will similarly award Kshs. 100,000/= for loss of expectation of life being the conventional figure awarded by various courts.

18. It came out in evidence that the deceased would send Kshs. 2500/= to Kshs. 3000/= to the plaintiff every month. There was however no direct evidence to prove exactly how much the deceased spent on his mother every month. In circumstances where the deceased had no children of his own and only had his parents as dependants, courts have determined dependency ration at 1/3 of the deceased's earnings.

19. The deceased was aged 23 years at the time of his death. The plaintiff did not submit on the multiplier while the defendant put the multiplier at 20 years with a dependency ratio at 1/3. I will however adopt a multiplier of 25 years guided by the case of **Betty Ngatia (administrator of the estate of Gladys Waithera Ngatia vs Samuel Kinuthia (1999) eKLR**. I determine the monthly earnings of the deceased at Kshs. 7,500/= per month, being the multiplicand considering that both PW1 and PW2 testified that the deceased earned between Kshs. 7000/= to 8000/= per month. In the premises, I asses the plaintiff's loss of dependency at Kshs.360, 000 made up as follows: 7,500x12x1/3.

20. In the end, I enter judgment for the plaintiff against the defendants jointly and severally for the sum of Kshs.503,100/= made as follows:

- | | |
|---------------------------------------|------------------------|
| a) Pain and suffering | Kshs. 10,000/= |
| b) Loss of expectation of life | Kshs. 100,000/= |
| c) Lost years | Kshs. 360,000/= |

d) Funeral expenses	Kshs. <u>89,000/=</u>
Total	Kshs. 559,000/=
Less 10% contribution	Kshs. <u>55,900/=</u>
Net total	<u>Kshs. 503,100/=</u>

21. I also award the plaintiff the costs of this suit and interest at court rates.

22. It is ordered.

Dated, signed and delivered in open court this 13th day of February, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Nyasimi for Oguttu for the plaintiff

Mr. Orieyo for the Defendants

Omwoyo: court clerk