



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 203 OF 2012**

**BENSON MUSYOKI MUNYAO.....1<sup>ST</sup> PLAINTIFF**

**EUCABETH GWACHI.....2<sup>ND</sup> PLAINTIFF**

**(Suing as the Administrators of the Estate of JACKLINE MONGINA GWACHI – (Deceased))**

**VERSUS**

**OMACHA ENTERPRISES LIMITED.....1<sup>ST</sup> DEFENDANT**

**BERNARD ONSONGO NYAROGI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**1. Background and Pleadings**

The plaintiffs are administrators of the Estate of Jackline Mongina Gwachi deceased by virtue of Letters of Administration *Ad Litem* issued to them in **Machakos Probate And Administration Cause No. 39 of 2012**.

2.The deceased is the wife of the 1<sup>st</sup> plaintiff who died in a road traffic accident on the 23<sup>rd</sup> August 2009 while being a lawful passenger in motor vehicle registration No. KAJ 879Y, that collided with another Registration No. KBA 833Z /ZC 8104 Mercedes Benz Prime Mover the property of the 1<sup>st</sup> defendant and being driven by the 2<sup>nd</sup> Defendant as the duly authorised driver and agent of the 1<sup>st</sup> Defendant.

3.In the plaint dated 30<sup>th</sup> May 2012 and filed on the 12<sup>th</sup> June 2012 the plaintiffs alleged that the driver of the Prime Mover KBA 833Z, drove and managed the said vehicle negligently, particulars of negligence stated, and as a result the estate of the deceased suffered loss and claims the said loss by way of damages under the Law Reform Act and the Fatal Accidents Act.

The plaintiffs stated particulars under statute that the deceased was 32 years old at date of death, was healthy and left behind her husband the 1<sup>st</sup> plaintiff and three children. He pleaded special damages of Kshs.2,250/=, funeral expenses as well as general damages and costs of the suit.

4.The defendants filed a joint defence on the 12<sup>th</sup> September 2012. It is dated the same day. Perusal of the same shows general denials of all allegations in the plaint. Particulars of the negligence are denied but occurrence of the accident is admitted but state that it was an inevitable accident caused by a tyre burst causing the vehicle to swerve, and lost to control causing the collision.

The defendants further denied the particulars under statute and that the plaintiffs are entitled to any damages.

5. Together with the Plaint, the plaintiffs filed a witness statement recorded by the 1<sup>st</sup> plaintiff on the 30<sup>th</sup> May 2012, and a list of documents as hereunder:-

- (1) **Letter for the Chief dated 25<sup>th</sup> August 2010**
- (2) **Certificate of death of the deceased**
- (3) **Police Abstract dated 28<sup>th</sup> September 2009 from Ntulele Police station.**
- (4) **Limited Grant of Letters of Administration**
- (5) **Motor vehicle Search records of KBA 833Z/ZC 8104.**

6. The defendants too filed their documents on the 12<sup>th</sup> September 2012.

- (1) **List of witnesses**
- (2) **Written statement by Bernard Onsongo and Henry Muguche Ondieki.**
- (3) **Certificate of examination and Test of motor vehicle no. 24133 and 24124.**

I have noted that Benard Onsongo Nyarende was the driver of the 1<sup>st</sup> defendants vehicle and the duly authorised driver at the date of the accident.

#### **7. Plaintiff's case**

**The 1<sup>st</sup> plaintiff Benson Musyoki Munyao** the husband of the deceased was not a witness to the accident but he confirmed that the deceased was his wife with whom they had three children. He asked the court to adopt the statement he recorded and filed on the 12<sup>th</sup> June 2012 and all the documents he filed as his evidence.

He produce the bundle of documents as Pext 2.

He urged the court to grant the reliefs sought in the plaint.

8. The defendants neither testified nor produced their written statements of their witnesses. However they filed their written submissions on the 10<sup>th</sup> November 2016.

9. From the onset, it is to be noted that as the defendants failed to adduce any evidence in support of their statement of defence, their said defence remains as mere statements, and the plaintiffs evidence unchallenged and uncontroverted.

See **Section 107 and 108 of the Evidence Act**, and the case **D.T Dobie Co(K) Ltd -vs- Wanyonyi Wafula Chebukati (2014) e KLR**. In this case the defendants did not adduce evidence in support of their defence rendering the plaintiffs evidence unchallenged, but also making the defendants claims in the defence unsubstantiated. Also in the case **Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others Nairobi HCCC No. 1243 of 2001**, the court held that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain as mere statements.

It is upon the above basis that I now proceed to interrogate the plaintiff evidence and the parties submissions.

10. The issues that comment to me for determination upon the plaintiffs evidence and the parties pleadings and the courts re-edition are:

**1. Whether the plaintiffs have *locus standi* to bring the suit.**

**2. Whether the plaintiffs have proved negligence for the death of the deceased against the defendants to the required standards, on a balance of probability.**

**3. Whether the plaintiffs are entitled to reliefs sought in the plaint.**

**4. Costs.**

**11. Analysis of plaintiffs evidence and both parties submissions.**

The plaintiff adopted his statement recorded on the 12<sup>th</sup> June 2012 as his evidence which he supported by production of his bundle of documents PExt.2.

The Letters of Administration *Ad Litem* pursuant to **Section 82(a) of the Law of Succession Act** empowered the plaintiffs to bring the suit arising from the deceased's death.

See **Court of Appeal holding in Trouistick Union International & Ingrid Ursula Heinz -vs- Jane Mbeyu & Alice Mbeyu Civil Appeal No 269 of 1997**, and reiterated in **Jesse Karaya Gatimu -vs Mary Wanjiku Ginjithi (2014) e KLR.**

Also **Section 4 of the Fatal Accidents Act** authorises the Administrators to bring the suit on behalf of the deceased's estate.

I agree with the defence submission that the burden of proof always rests on the plaintiff to establish a *prima facie* case on a balance of probabilities, and that pleadings alone cannot be treated as evidence, they have to be produced and proved.

12. There is no dispute at all that the accident occurred in the manner described in the defendants defence. That it was due to a tyre burst which caused the driver to loose control that led to the collision. There is also no dispute that the deceased died in the accident a fact confirmed in the police Abstract from Gwasi Police Station where the accident was reported following which investigations the driver the 2<sup>nd</sup> defendant was charged with the offence of causing death by dangerous driving, not only of the deceased hereof, but of several other passengers in motor vehicle Registration No. **KAJ 8 7AY, in Traffic case No. 303/2009 (Narok)**

13. On the defendants submission that the police abstract could not in itself alone be sufficient evidence of the occurrence of the accident and ownership of a motor vehicle, it is my finding is that as the production of the same by the plaintiff was not objected to its contents remain unchallenged too, and they cannot be challenged through submissions.

See **Musau Muthoka** (suing as the Administrator of the Estate of the Late **Mutisa Musau & Another -vs- Dodoma Transport Agency and Another (2014) e KLR.**

14. The same holding was also stated in the case **Joel Muga Opija -vs- E.A Sea Food Ltd (2013) e KLR.**

In any event, the plaintiff produced Records of Motor vehicle from Kenya Revenue Authority (Document No.5 in PExt 2) that clearly showed ownership of the accident vehicle as the 1<sup>st</sup> Defendant. In my considered opinion, the KRA records for motor vehicle tractor ZC 8104 as at 2<sup>nd</sup> March 2012 refers to the Prime Mover and the trailer that together formed the accident vehicle. They cannot be separated for purposes of this case. I therefore find that the ownership of the accident vehicle was proved.

15. In the statement recorded by the 2<sup>nd</sup> defendant, he stated that he was driving motor vehicle registration No. KBA 833Z/ZC 8104, being the authorised driver and employee of the 1<sup>st</sup> defendant.

He did not state that the trailer and the prime mover belonged to different persons. I find the defendants' assertion unsustainable.

16. The defendants' submission that failure by the plaintiffs to file a reply to defence translated to an admission of the denial of negligence has been settled in numerous court decisions. **Rule 12(1) of Order 2 Civil Procedure Rule** states clearly that:

*“where reply to defence is not filed, there is an automatic joinder of issues in the defence..”*

The meaning and purport of the above provisions of **Order 12 Rule 2** were well captured in **HCC No. 380 of 2013 KCB -VS- Suntra Investments Ltd (2015) e KLR**.

The phrase “**Joinder of issue**” is defined in **Blacks Law Dictionary** as:

*“the submission of an issue jointly for decision, the acceptance or adoption of a disputed point as the basis of argument in a controversy.”*

I find that it is not always necessary to file a reply to defence as the statement of defence denying the plaintiffs' claim forms a dispute for decision and determination by the court.

See also **United Millers Ltd Another -vs- John Mangoro Njogu (2016) e KLR**.

Evidence was tendered by the plaintiff's evidence recorded in his statement, and documents produced, as well as the 2<sup>nd</sup> defendant's statement that the accident was solely caused by the 2<sup>nd</sup> defendant's vehicle, when its tyre burst sending it downhill after it lost control causing it to collide into motor vehicle registration No. KAJ 879Y.

17. The defendants having not called any evidence to controvert the plaintiff's particulars of negligence as stated, it follows that the Defendants are jointly and severally liable in negligence and all consequential loss and damage to the plaintiff.

18. **Damages under the Law Reform Act** are awarded for the benefit of the Estate of the deceased, under the following sub-heads:

**(a) Pain and suffering.** No evidence was led as to whether the deceased died on the spot or not. In the circumstances, I shall award a NIL damage.

**(b) Loss of expectation of life.** No evidence was adduced that the deceased was unhealthy. She was only 32 years. Conventional awards is Kshs.150,000/= to Kshs.300,000/=.

See **Silas Mugendi Nguru -vs- Nairobi Women's Hospital (2014) @KLR** and **Eldoret Express Co. Ltd -vs- William Kirui Korir (2014) e KLR** among other decisions. I award a sum of Kshs.200,000/=.

19. **Damages Under the Fatal Accidents Act**, commonly referred to as Loss of dependency are awarded to the deceased's dependants, in this case the 1<sup>st</sup> plaintiff who is the widower of the deceased and the three children. In assessing the *quantum*, the court will be guided by the age of the deceased at date of the death, the monthly or yearly income and the expected length of dependency.

See **Beatrice Wangui Thairu -vs- Hon. Ezekiel Barngetuny & another HCCC No. 1438 of 1998**.

20. The age of the deceased is stated as 32 in the death certificate. It is stated that she was a housewife. A letter from the Chief produced as exhibit confirms the three children as children of the deceased with the 1<sup>st</sup> plaintiff.

Although the ages of the children is not stated, it is safe to assume that they were school going and therefore minors, taking into account the deceased age at date of death.

The plaintiff stated in his statement that the deceased used to assist him from subsistence farming to feed the family.

In his submissions, the plaintiff has proposed:

**a) Income of Kshs.5,436/90 monthly.**

**b) Multiplier of 39 years**

**c) Multiplicand of 2/3**

On the other hand, the defendants in their submissions have urged that no evidence was tendered of the deceased's income, as she was said to be a house wife doing subsistence farming.

As such, it is submitted, there can be no multiplier nor a multiplicand, hence there can be no award for loss of dependency.

21. There is no dispute that the deceased was a housewife. She must have been taking care of the children and it is common knowledge, and acceptable that a housewife contributes to a family's welfare not only through an income generating venture but by also her motherly duties, cooking, washing, tending domestic animals and generally taking care of the family and wifely chores. Her duties may be equated to a “**househelps**” work which is numerated in terms of the minimum wages provided by the government through the Ministry of Labour at various periods.

22. I echo sentiments expressed by the **Court of Appeal in Jacob Ayiga Maraga & Francis Karani -vs- Simeon Obayo C.A. No. 167 of 2002 (Kisumu) and in David Kajogi M'ugaa -vs Francis Muthomi (2919) e KLR** that:

***“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who keep no record and yet earn their livelihood in various ways.”***

I am persuaded that the deceased's contributed to the emotional and financial wellbeing of the family. As no records are available, I shall apply the Minimum Wages guidelines for the period 2009 to determine the applicable income on the category of a domestic worker/helper, cleaner unskilled worker shown as Kshs.4,500/= thus an average of Kshs.5,000/= per month.

23. The plaintiff has proposed a monthly income of Kshs.5,436/90 citing Regulations of Wages for unskilled workers by **Legal Notice No.117 of 2015**.

In my view the relevant guidelines ought to be 2009.

I have looked at Legal Notice No. 70 of 2009. It provides Kshs.5,665/= as the minimum wages for an unskilled worker.

I shall therefore adopt an income of Kshs.5,000/= per month and a multiplicand of 2/3 against a multiplier of 25 years. The court of Appeal in **Board of Governors of Kangubiri Girls High School & Another -vs- Jane Wanjiku Muriithi & Another, (2014) e KLR** held that:

**“the nature of the profession engaged in also counts.”**

In none formal professions or ventures, there is no fixed retirement age and one can work upto over seventy save for servitudes of life.

24. In **HCA No. 141 of 2015-Charles Omwenga Ongiri -vs- Daniel Muniko(2017) e KLR** the court on appeal upheld a multiplier of 25 years for a 32 year-old deceased.

Also in **Wilter Chemutai Torongei -vs- W.E. Tiltey Muthaiga Ltd & Another (2017) e KLR**, I adopted a multiplier of 25 years for a 32 year old man.

Guided by the above decisions and Others, I shall adopt a multiplier of 25 years.

Thus, loss of dependency shall be as follows:

$$\text{Kshs.5,000 X 12 X 2/3} = \text{Kshs.1,000,000/=}$$

25. **Special Damages** are pleaded at Kshs.2,250/= No proof was tendered. I shall disallow the same.

26. Funeral expenses though pleaded were not proved. No specific sum was pleaded. The plaintiff has urged that a reasonable sum be awarded. The defendant submitted that as no proof of any sum towards funeral expenses was proved, no award ought to be granted.

It is trite that a family in burying its loved one ordinarily incurs expenses, and proof of the same may not be available.

The **Court of Appeal in Paul Momanyi Soire Nathan -vs- Caroline Moraa Akumbi & Another (2015) e KLR**, reiterating its decision in **Premier Dairy -vs- Angarjit Singh Sagoo & Another Court of Appeal No. 312 of 2009 – (2013) @ KLR** rendered that:

***“We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when their primary concern is that a close relative has died.”***

27. In the said Appeal, the Judges of appeal upheld an award of Kshs. 150,000/= as special damages towards funeral expenses.

In the present case, I will not go outside the reasonably accepted norms that the family of the deceased must have incurred expenses to bury their own. I think a reasonable amount of Kshs.30,000/= would be fair to cover that expense.

28. The sum total of the above is that the plaintiffs have proved their case against the defendants to the required standards. Consequently I enter judgment for the plaintiffs against the defendants jointly and severally as follows:

1. Liability 100% against the defendants, Jointly and severally

2. Damages for

**(a) Pain and Suffering - Kshs. NIL /=**

**(b) Loss of expectation of life- Kshs. 200,000/=**

**(c) Loss of dependency - Kshs.1,000,000/=**

**(d) Special Damages - Kshs. 30,000/=**

**Total Kshs.1,230,000/=**

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3.The plaintiff's shall have costs of the suit. Interest at court rates shall accrue on **2(b), (c) and (d)** from the date of this judgment.

**Dated, Signed and Delivered this 4<sup>th</sup> Day of May 2017.**

**J.N. MULWA**

**JUDGE**