



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 337 OF 2011

**JACKSON KARIUKI NDEGWA.(suing as the administrator of the Estate of
FABIUS MUNGA KARIUKI.....PLAINTIFF**

VERSUS

PETER KUNGU MWANGI..... DEFENDANT

JUDGMENT

1. The plaintiff **Jackson Kariuki Ndegwa** sued the defendant as the Administrator of the Estate of Fabius Munga Kariuki who was fatally knocked down by the defendants motor vehicle Registration Number KAZ 992U along the South Lake Road at Naivasha on the 22nd November 2008.

A Consent judgment on liability was recorded on the 10th November 2015 apportioning liability at 80:20 ratio in favour of the plaintiff. The issue left for determination by the court is quantum of damages payable to the deceased's estate.

2. From the documents produced as exhibits by the plaintiff with consent by the defendant, the following facts are not in dispute:

That the deceased was thirty-six(36) years old, was a father to an eight and a half (8½) years old girl child and was employed by G &G Houses Limited with a basic salary of Kshs.35,000/- and house allowance of Kshs.8,000/= per month; and travelling expenses of Kshs.15,000/= making a gross salary of Kshs.58,000/=and entitled to overtime payment when taken, that other than the said child, he used to provide for his elderly parents from his salary.

3. PW2, Chege Mbugua testified that he was an accountant at G & G Limited and produced a Letter of Appointment showing that the deceased was indeed its employee and also his payslips for the months of August 2008 showing Basic Wages as Kshs.35,000/= and housing allowance of Kshs.8,000/=, sales commission of Kshs.12,800/= and travelling allowance of Kshs.15,000/= making a total of taxable income of Kshs.70,800/=. It shows a Gross Pay less Pay As You Earn (P.A.Y.E) of Kshs.64,869/=.

Likewise, payslips for the months of September 2008 and October 2008, a month before the deceased's death replicate the same earnings, save for sales commission which is different, for understandable reasons that is sales commission based on the sales for the month or period.

So what was the deceased's income at the time of his demise?

The plaintiff submits that as the Letter of Appointment allowed overtime payments at one and a half times

on normal working day and a two times for overtime worked on public holidays, then such ought to be considered. On the other hand, the defendant submits that the sum of Kshs.35,000/= basic salary ought to be applied which sum was pleaded in the statement of claim.

4. I have considered the oral arguments on the above issue – *viz-a-viz* the sums shown in the last three payslips of the deceased. House allowance, Sales Commissions, overtime payments, travelling allowances in my considered view cannot form part of the income for purposes of computing lost income under the Fatal Accidents Act.

Under Section 4 of the Fatal Accidents Act, Chapter 32, any action is brought for the benefit of the family/Estate of the deceased. Once a person has dies, his estate cannot enjoy benefits that were personally enjoyed by the deceased like sales commissions, travelling allowances, housing allowance, overtime payments as such benefits are personal to the person. To that extent, the only financial loss suffered by the dependents is the basic salary in this case Kshs.35,000/=. According to Kenya Revenue Authority tax calculator table-July 2014, under the Income Tax Act, Chapter 470, Pay as you Earn(P.A.Y.E) on Kshs.35,000/= taxed at 25% would be Kshs.8,750/= leaving a NET income of Kshs.26,250/=. This is the amount I would have adopted had the defendant not urged the court to adopt a sum of Kshs.35,000/= for purposes of calculations on loss of dependency. I shall adopt the said sum. Thus the said loss of dependency would then work as follows:

$$\begin{aligned} & \text{Kshs.35,000} \times 12 \times 18 \times \frac{2}{3} \\ & = \text{Kshs. 5,040,000/=} \end{aligned}$$

5. **Under the Law Reform Act**. The plaintiff proposed a sum of Kshs.20,000/= for pain and suffering and Kshs.150,000/= under Loss of expectation of life.

It was relied on the cases **Joseph Waithagi Muracha -vs- Peter Gitau Chege HCCC No. 438 of 1996, and Alice Mboga -v-s Samuel Kiburi Njoroge**. Under the above cases, the courts allowed Kshs.150,000/= and 100,000/= respectively for damages for loss of expectation of life and Kshs.20,000/= for pain and suffering. The defendant proposed damages for pain and suffering at Kshs.10,000/= while loss of expectation of life Kshs.100,000/= was put forth.

Reliance was had to **Elizabeth Musondi & Another -vs- Easy Coach Limited (2013) e KLR** and **Wayua James & Another -vs- Daniel Kipkirong Tarus (2015) e KLR**.

6. The court has considered the above authorities and counsel propositions. I shall adopt damages under this subhead of Kshs.20,000/= for pain and suffering and Kshs.150,000/=. In doing so, the court has considered that no evidence was lead as to indicate that the deceased would not have lived a healthy and happy working life if not for the accident.

7. **Under the Fatal Accidents Act**, it is not in doubt that the deceased's dependants suffered loss and damage as a result of the deceased's demise due to the Accident. He was thirty six(36) years old and would have lived a healthy working life for a period of twenty-four(24) years to attain the official retirement age of Sixty(60), and even continue to work to may be over seventy(70)years save for usual vagaries of life, and the uncertain labour market and other eventualities. There is no certainty as to how long the deceased would have lived or continued to work.

Doing the best I can, I shall adopt a **Multiplier of 18 years**.

I have considered comparable authorities, and in particular, **Ignatious Oketch Ombara -vs- Easy Coach Ltd (Supra)**, the court adopted a multiplier of 17 years for a **35 year old man**. In **Rebecca Sarethi Mwangi -vs-Eastern Bus Service Ltd & Another (2000) e KLR**, the court adopted a multiplier of 19 years for a 36 years old teacher.

8. As stated above, the deceased left behind a young daughter and his elderly parents who he was

supporting. There is no rule of thumb that when one is single/unmarried, a 1/3 multiplicand ought to be applied. Each case ought to be considered upon its peculiar circumstances. The deceased was not in a legal marriage, but out of the come-we-stay relationship there was a child. The plaintiff testified that the deceased was indeed paying school fees for his daughter and offered financial support to his elderly parents. The court shall **adopt a multiplicand of 2/3**.

9. The plaintiff pleaded a sum of Kshs.170,000/= as special damages, being funeral expenses. The plaintiff did not produce any receipts to support the claim. This in my view does not mean that no funeral expenses were incurred by the family towards funeral expenses. The courts have held in numerous decisions that a mourning family may not be concerned with issues of keeping all receipts in anticipation of receipts in anticipation of court cases. Reasonable expenses ought to be allowed – See **C.A. No 40 of 2013 Alfred Opiyo -vs- Lawrence Oduori (2015) KLR** and **C.A. NO. 57 of 2014 Paul Momanyi -vs- Caroline Moraa Akumba**.

Considering the station in life of the deceased as an operations manager, I shall allow a sum of Kshs.100,000/= towards funeral expenses.

10. In summary, these are the awards of the court in general and special damages:

Under Law Reform Act

- Pain and suffering	-	20,000/=
- Loss of expectation of life	-	<u>150,000/=</u>
		170,000,=
		=====

Loss of Dependency

(Under the Fatal Accidents Act)

Income/salary - Kshs.35,000/=

Multiplier 18 years

Multiplicand 2/3

Thus – Kshs.35,000 X 12 X 18 X 2/3 = **Kshs.5,040,000/=**

• Less damages

Under Law Reform - Kshs. 170,000/=

Balance - 4,870,000/=

• Add special damages - 100,000/=

4,970,000/=

Less 20% contributory negligence - 994,000/=

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3,976,000/=

11. The above sum shall accrue interest at court rates from the date of this judgment. The plaintiff will have the costs of the suit.

Dated, signed and delivered in open court this 10th day of March 2016.

JANET MULWA

JUDGE