



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL SUIT NO. 349 OF 2010**

**M O** (*Suing as personal representative of the estate of*  
**C O O – DECEASED**).....**PLAINTIFF**

**-VERSUS-**

**SIMON KIMUTAI**

**TUHURA ISSA t/a TRANSLINE CLASSIC..... DEFENDANTS**

**JUDGEMENT**

1. This suit is brought by the Plaintiff, **M O**, in her capacity as the widow of **C O O** (herein, the deceased) and legal representative of his estate.

In the plaint dated the 7<sup>th</sup> December 2010, it is pleaded that on or about the 30<sup>th</sup> August 2009, the deceased was travelling as a passenger in motor vehicle **Reg No. KBB 459H**, which was being driven along the Kisii – Keroka road when it was hit by a motor vehicle Reg No. **KBD 114P**, belonging to the defendant, **Simon Kimutai**, and being driven at the time by his driver and/or agent James Momanyi Nyaberi.

2. The said driver and/or agent is alleged to have driven the defendant's vehicle in a manner which was so negligent such that it collided with the vehicle in which the deceased was travelling thereby causing him fatal injuries.

The Plaintiff contends that the defendant's driver/agent drove his vehicle at a speed which was excessive in the circumstances, drove without due care and attention to other road users, overtook at a blind bend of the road and failed to observe traffic rules and the Highway Code among other factors.

3. The Plaintiff therefore brought this suit under the Law Reform and Fatal Accidents Act praying for both special and general damages against the defendant who denied all allegations made against him by the Plaintiff and in particular those of negligence. He contended in his statement of defence that if indeed the accident occurred, then it was inevitable and without negligence on his part.

4. In the alternative, the defendant contends that the accident was solely and/or substantially contributed to by the negligence of the driver of motor vehicle Reg No. KBB 459H, in that he drove his vehicle without due care and attention and sufficient regard for the safety of other road users, drove at an excessive speed in the circumstances and collided with motor vehicle Reg No. KBD 114P among other factors.

The defendant therefore prayed for the dismissal of the Plaintiff's suit against him.

5. At the hearing of the suit, evidence was led on behalf of the Plaintiff **MO (PW 2)**, by herself and by **CIP Abraham Ndegwa (PW 1)**, who was at the material time the traffic base commander at Keroka Police Station. A clinical officer at Kisii Teaching and Referral Hospital, **Jackson Murandi (PW 3)**, also testified on behalf of the Plaintiff.

6. CIP Ndegwa (PW 1), confirmed the occurrence of the accident and indicated that the defendant's driver was to blame for the accident but disappeared thereafter. He (PW 1) produced the necessary sketch plans (P.Ex 1), the police abstract (P.Ex 2), inspection reports (P.Ex 3 a – b) and a post mortem report (P.Ex 4) in respect of the deceased.

7. The Plaintiff (PW 2) testified that the deceased was a lecturer at Kisii Extra Mural Campus of the University of Nairobi and that he passed away following injuries sustained in the accident. She produced the necessary death certificate (P.Ex 5) and later obtained a temporary grant of letters of Administration (P.Ex 6) for purposes of filing this suit. A full grant (P.Ex 7) was eventually given to her.

She indicated that the deceased was employed in the year 2007 and produced a letter to that effect (P.Ex 8).

8. The Plaintiff further testified that the deceased earned a salary of Ksh. 105,000/= and produced his pay slips for the months of April, May and June 2009 (P.Ex 9 a – c). She said that the deceased was a part time lecturer at Kisii University and an examiner with KASNEB. She produced necessary documents to establish the fact (P.Ex 10 and 11). She also produced a letter (P.Ex 12) and a registration certificate (P.Ex 13) showing that the deceased was a director and lecturer at Henley Business School where he earned Ksh. 30,000/= per month.

9. It was further the testimony of the Plaintiff that the deceased and herself were blessed with two children aged 9 years and 6 years respectively at the time of the demise of the deceased. Their school fees was normally paid by the deceased. Necessary documents (P.Ex 14) from the schools were produced by the Plaintiff who went on to produce a search certificate (P.Ex 15) to confirm that the defendant was the owner of the motor vehicle Reg No. KBD 114B. She indicated that she incurred funeral expenses amounting to Ksh. 36,000/=.

10. The clinical officer (PW 3), testified that the deceased died while undergoing treatment at Masaba District Hospital and that the cause of death was cardiopulmonary arrest secondary to severe head and chest injuries. He confirmed that the necessary post mortem report was prepared and signed by DR. Boruchi, a medical officer of health at Kisii District Hospital with whom they worked for a period of four (4) years.

11. The evidence by the clinical officer marked the closure of the case for the Plaintiff but before commencement of the case for the defendant, the parties went into discussions with a view to settling the matter and with prompting from the court in the spirit of Article 159 of the Constitution.

The discussions bore fruit with a consent judgement on liability. Thus, judgement on liability was entered for the plaintiff against the defendant at a ratio of 35% against 65%.

12. The defendant is therefore found liable to the plaintiff in damages at the rate of 65% while the plaintiff takes 35% of the blame.

This court was left to make a determination on quantum of damages and in that regard both the plaintiff and the defendant filed their respective written submissions.

This suit was brought under the Law Reform Act and the Fatal Accidents Act. Therefore, the damages awardable to the plaintiff would be under the two Acts in addition to any other damages that the court may deem legally fit.

13. Basically, the term “damages” refer to a type of money remedy which consists of a sum assessed in the course of a trial and that ordered to be given as a payment by or on behalf of the defendant for loss suffered by the plaintiff at the hands of the defendant. It is a pecuniary compensation obtainable by success in a suit for an actionable wrong, the compensation being a lump sum awarded unconditionally and generally expressed in the Kenya currency (See, Casebook on measures of damages for bodily injuries by Richard Kuloba, Judge Emeritus of the High Court of Kenya and published by Law Africa).

14. Under the Law Report Act, compensation would be for loss of expectation of life and perhaps for pain and suffering for the benefit of the estate of the deceased. Damages awardable under the Fatal Accidents Act would be loss of dependency for the benefit of the dependants of the deceased.

Curtailment of the life span of the deceased person gives rise to compensation for a non-pecuniary injury. Such an award is based on the presupposition that a person has a legal right that his life shall not be abridged by the negligence of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given (see, Kemp & Kemp “Quantum of Damages” Vol.1).

15. MR. Nyasimi, learned counsel for the plaintiff, has proposed herein that a sum of Ksh. 1.5 million and, a sum of Ksh. 1 million be awarded for pain and suffering and loss of expectation of life respectively.

Learned counsel for the defendant, MR. Kimanga, proposed a sum of Ksh. 150,000/= for pain and suffering and nil amount for loss of expectation of life.

Both counsels cited several authorities in support of their respective proposals.

16. The death certificate (P.Ex 5) placed the age of the deceased at forty six (46) years as at the time of death. It also showed that the deceased died on the material date of the accident i.e. 30<sup>th</sup> August 2009.

C. IP Abraham Ndegwa (PW 1), implied in his testimony that the deceased died almost immediately after the accident as he was pronounced dead on arrival at Masaba Hospital.

17. Damages under the Law Reform Act are separate and distinct from damages under the Fatal Accidents Act. The two sets of damages can be awarded to the same beneficiaries without there being a danger of double compensation. In some instances the ultimate beneficiaries would be different persons.

Taking into consideration all the foregoing factors, it is the opinion of this court that a sum of Ksh. 100,000/= for loss of expectation of life and a further sum of Ksh. 100,000/= for pain and suffering would suffice as reasonable and adequate compensation under the Law Reform Act.

18. The Fatal Accidents Act provides a cause of action by the dependants of a deceased person and when damages are assessed under the Act it is a hard matter of cash money leaving no room for what may be called sentimental damage, bereavement or pain and suffering. The measure of damage is the pecuniary loss which has been suffered and is likely to be suffered by each dependant.

Courts are normally faced with difficulties in assessing damages under the head but are required to do the best they can in the circumstances.

19. Herein, the deceased was aged forty six (46) years at the time of death. He was survived by his wife (the plaintiff) and two sons, A and L, aged nine (9) and seven (7) years respectively at the time.

The plaintiff and the two sons constituted the actual dependants of the deceased although the deceased’s surviving mother, P, was also mentioned as a dependant.

20. The deceased was at the time of his death employed as a lecturer at the University of Nairobi. The

availed pay slips (P.Ex 9 a – c) showed that he earned a basic salary of Ksh. 53,550/= per month. The gross salary was Ksh. 103,802/= per month and the net salary was Ksh. 12,814/50 cts due to statutory deductions and the personal financial commitments of the deceased who was also said to have earned extra income from part time engagements with KASNEB and KISII UNIVERSITY. He was also a manager at HENLEY BUSINESS SCHOOL earning a monthly salary of Ksh. 30,000/=.

**21.** Proof of earnings from the said extra-engagements was however, not achieved herein by the production of letters from those institutions (i.e P.Ex 10, 11 and 12). Those letters merely confirmed that the deceased undertook temporary or part time assignments with the said institutions. There was no document such as payment receipts, payment voucher or invoices establishing the earnings of the deceased from the extra engagements.

**22.** In the circumstances, the assessment for loss of dependency ought to be pegged on the deceased's monthly earnings from his permanent employment with the University of Nairobi. The alleged extra earnings from temporary employment cannot be factored in for want of proof.

The proposal made by learned counsel for the plaintiff respecting loss of dependency was a sum of Ksh. 32,032,000/= made from a multiplicand of Ksh. 182,000/- per month, a multiplier of twenty-two (22) years and a dependency ratio of 2/3rds.

**23.** Learned counsel for the defendant proposed a sum of Ksh. 8,400,000/= made from a multiplicand of Ksh. 70,000/= per month, a multiplier of fifteen (15) years and a dependency ratio of 2/3rds.

In this court's opinion, regard being given to relevant documentary evidence placed before it, a multiplicand of Ksh. 40,736/= being the difference between the deceased's basic salary and net salary and a multiplier of nineteen (19) years based on a retirement age of sixty five (65) years and a dependency ratio of 2/3rds shall suffice for loss of dependency.

**24.** The plaintiff would thus be entitled to loss of dependency as follows:-  $\text{Ksh } 40,736 \times 12 \times 19 \times \frac{2}{3} = \text{Ksh. } 6,191,872/=$ .

As for special damages, the plaintiff claimed a sum of Ksh. 36,000/= for funeral expenses and legal fees for a limited grant of letters of administration respecting the estate of the deceased.

The amount established by necessary documentary evidence (P.Ex 6) is Ksh. 6000/= for the limited grant.

The plaintiff is therefore entitled to special damages in the sum of Ksh. 6000/= only.

**25.** In sum, judgement be and is hereby entered in favour of the plaintiff in the total amount of Ksh. 6,397,872/= less 35% (i.e. Ksh. 2,239,255/-) leaving the ultimate balance of Ksh. 4,158,617/- together with costs and interest.

**J.R. KARANJAH**

**JUDGE**

**[Delivered and signed this 13<sup>th</sup> day of April 2016].**