



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 5 OF 2012 (FAST TRACK)**

**PATRICK KANAI WAWERU(suing as the legal Administrator of the estate of**

**GRACE NJOKI KANAI .....PLAINTIFF**

**VERSUS**

**GEORGE OGWELLA.....1<sup>ST</sup> DEFENDANT**

**ALL DEAN SATTELITE NETWORK LTD.....2<sup>ND</sup> DEFENDANT**

**GEORGE OCHILO AYAKO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**1. Brief Background**

The plaintiff, Patrick Kanai Waweru brought this suit as the Administrator of the Estate of one Grace Njoki Kanai, his deceased wife who died in a road traffic accident on the 12<sup>th</sup> January 2007 along the Mai Mahiu-Naivasha Road involving two vehicles, motor vehicle registration Number KAE 201J where she was travelling in as a fare paying passenger and motor vehicle **Registration Number KAM 929G** which vehicles collided headon causing fatal injuries to the deceased. He sued the owner and driver of motor vehicle **Registration No. KAM 929G** for negligence and sought general damages under the Law Reform Act and the Fatal Accidents Act, and also special damages.

**2. Liability**

The issue of liability between the parties was sorted out when on the 2<sup>nd</sup> October 2012, a consent judgment was recorded at the ratio 15:85 in favour of the plaintiff and against the defendants jointly and severally. This left the court to assess damages only.

**3. Assessment of Damages**

The principles applicable to an assessment of damages under the Fatal Accidents Act are clear. That the court must find out the value of the annual dependency called the multiplicand which is determined by getting the net earnings of the deceased. The court then should multiply the multiplicand by a reasonable figure representing so many years purchase usually called the multiplier bearing in mind the expectation of earning life of the deceased, and the dependants left behind. The sum arrived at must then be discounted to allow the legitimate considerations such as the fact that the award being received is a lumpsum and would if wisely invested yield returns of an income nature.

These principles were put together by Ringera, J, (as he then was) in **Beatrice Wangui Thairu -vs- Hon. Ezekiel Bargetuny and Another** In **NBI HCCC NO. 1638 of 1988(UR)**.

4. As stated in **Nyamira Tea Farmers Sacco -vs- Wilfred Nyambati Keraita & Another Kisii Civil Appeal No. 68 of 2005 (2011) KLR** by Asike – Makhandia, J, the Court ought to reduce the NET income by deducting income tax where applicable and statutory taxes.

#### 5. Damages Under the Fatal Accidents Act

In this present case, the parties recorded further consent orders on the Multiplier at twenty-four(24) years. The only issues for the court to determine, to be able to assess the damages under the **Fatal Accidents Act** is the **income** of the deceased prior to her demise, and the **dependency ratio**.

6. In his further Amended plaint filed on the 30<sup>th</sup> June 2014, the plaintiff pleaded that the deceased was 34 years old and was a businesslady running both a flour *posho* Mill and grain outlet, was retailing petroleum that included a kerosene pump at Karagita area in South Lake Naivasha – Nakuru County, and all put together, brought an average monthly income of Kshs.50,000/= to Kshs.100,000/= from which she used to support her family, and which income was likely to increase due to her business acumen. In his evidence, the plaintiff testified that the businesses were run under the name “**Milimani Stores**” though not registered, and the proceeds from the said businesses were being deposited in both the deceased's account operated at Equity Bank Limited Naivasha and in his other business account at Barclays Bank Limited where proceeds of his other business of transport and real estate were being deposited and which was in his personal name.

7. It was his testimony that the couple kept business accounts and produced as exhibits the bank statements in both accounts, invoices and deliveries by suppliers of both the kerosene pump fuels as well as all other supplies and sales. He further stated that the family businesses were audited, and their accountant who testified as PW2 produced audited accounts for the years 2005 and 2006.

From these documents, it was his testimony that the deceased's income was assessed at an average of Kshs.50,000/= to Kshs.100,000/= per month.

8. **PW2 Peter Mwangi Waithaka** described himself as an accountant practicing in the firm of **Waithaka Mwangi Associates**. It was his testimony that he was the plaintiff's family businesses accountant and confirmed having prepared accounts for the business that used to be operated by the deceased trading as “**Milimani Stores**,” and that included cereals and produce store, *posho* mill, and kerosene pump sales. He stated that as family businesses, there were no clear cut demarcations as proceeds used to be banked in either of the two accounts. He confirmed having prepared the couples accounts both for tax and management purposes since 2004.

He produced as PExh 4 and 5 Report and Financial Statements for the year ended 31<sup>st</sup> December 2005 and 31<sup>st</sup> December 2006 for the business “**Milimani Stores**”, and for comparative purposes also produced accounts for the year 2004.

9. In his financial Statements, he indicated annual profit for the year 2005 was Kshs.755,033/= whereas for the year 2006, the annual profit was Kshs.890,350/= after deducting all expenses.

It was his statement that from the said accounts, he determined the deceased's contribution to the businesses as Kshs.900,000/= per annum.

10. On cross examination, the accountant stated that the Bank statements under the deceased's name at Equity bank was clear on the deposits and withdrawals that show drawings of Kshs.975,410/= in 2005, that he used the said bank statements to arrive at the deceased's contribution at about Kshs.900,000/= annually, an average of the two years profits.

In his submissions, the plaintiff's Advocate, Mr. Kihara urged the court to adopt a sum of Kshs.100,000/=

as the deceased's income as proposed by the accountant to calculate loss of dependency.

It was his further submission that the dependency ratio of  $\frac{3}{4}$  was proposed and agreed. I have perused the proceedings. I have not seen any agreement or consent recorded on the dependency ratio.

Mr. Onyambu Advocate for the defendants in his written submissions denies any consent having been reached on the dependency ratio. It is his submission that a party has to prove the actual portion a deceased utilised out of his income to support the dependants citing the case **Leonard O. Ekisa and Another -vs- Major K. Birgen (2005) e KLR** – that, the extent of dependency is a question of fact to be determined in each case which fact ought to be established by evidence. It was the defendants submission that the plaintiff failed to establish the personal income of the deceased and therefore, the court ought to adopt a global sum approach, and need not establish the extent of dependency.

#### 11. What then was the deceased's income?

The defendants submissions are that the deceaseds did not operate her own business but the plaintiff's business in the name “**Milimani Stores**” and that is evident from the fact that the said businesses were in the name of Patrick Kanai Waweru, the plaintiff as seen from the Business Permit Number 0325 issued y the Municipal Council of Niavasha for the kerosene business, and the audited accounts also in the name of the plaintiff Patrick Kanai Mwangi. It is their further submissions that the business continued to operate even after the demise of the deceased. The court was urged not to assume and treat the family income from the family business as the personal income of the deceased, but to look at the evidence adduced, and determine the deceased's own remuneration from the business.

12. The court has confirmed that the deceased was assisting and/or managing the plaintiff's businesses licensed in his name. The proceeds from the said businesses were being deposited in the plaintiff's account at Barclays Bank-Naivasha and as stated by the accountant, in the deceased's bank account **Number 0200190259511** at Equity Bank Naivasha. A perusal of the deceased's bank statement confirms a very active trading account by credits and debits on a daily basis.

A scrutiny of the deceased's account for the period 28<sup>th</sup> June 2006 to the 31<sup>st</sup> December 2006 (Six months period) shows cash deposits of Kshs.655,830/= and withdrawals of Kshs.542,444/=. The difference of the cash deposits and cash withdrawals leaves a NET sum of Kshs.100,000/= on average. The accountant explained that, referring to the accounts, the Net annual income for the year 2005 was Kshs.755,033/= while the net income for the year 2006 was Kshs.890,350/=. These figures give a monthly income of Kshs.63,000/= and Kshs.74,000/= per month for year 2005 and 2006 respectively. It is therefore not far fetched that the accountant submitted the monthly net income from the deceased's income going by her Bank statements, in the region of Kshs.50,000/= to Kshs.100,000/= per month.

13. But then, this business was not the deceased's personal business, as it was licensed in her husbands (plaintiff's)names and the licence indicated that it was not transferable. Being a family business, the only assumption that this court may make is that the deceased was the manager, not in the strict sense of having been employed by her husband as such, but managing the business on her own behalf and that of the plaintiff for the benefit of that family. As the manager of the family businesses she no doubt earned an income, though not strictly a salary as none was demonstrated. The defendants in their submissions conceded to the above assumption and urged the court to determine her personal remuneration from the income from the business.

I have stated above that the accountant's submission of Kshs.50,000/= to Kshs.100,000/= per month from the business operated by the deceased was not far fetched. The plaintiff in his testimony did not tell the court what he used to give to the deceased as her personal income.

The defendants have urged that in the absence of any proof of the deceased personal income the court ought to adopt a global sum approach and citing the case **Rishi Hauliers Ltd -vs- Josiah Oundi Onyanja (2015) e KLR** where the court held that the respondent did not provide any basis establishing how much the deceased earned, and that, the court added, was not to say that the deceased never earned

any income.

14. In this present case, evidence was adduced and the court is satisfied by dint of the deceased personal bank account at Equity Bank Limited–Naivasha that indeed the deceased was operating some business whose monthly income ranged between Kshs.50,000/=– Kshs.100,000/=. Since no Income Tax Returns and or evidence of her remuneration and statutory deductions were tabled before the court, the court finds it prudent to adopt the global approach stated in the **Rishi Hauliers case (Supra)** and **Theta Tea Co. Ltd and Another -vs- Florence Njau Njambi NRB Civil Appeal No. 64(2000) e KLR** where the court expressed its view:

*”---- that it would be a great injustice to a lot of Kenyans if the court would subscribe to the view that the only way to prove a profession of a person or income were by production of documents, as having earned their livelihood in various ways without any documentation the banks statements of the deceaseds are evident that the deceased had an income”.*

15. Based on the average income per month as stated by PW2 the accountant, and after the court factors deductions of Income Tax and Statutory deductions at about (K.R.A. rates)30%, the court in its discretion based on the evidence adduced shall adopt a monthly income (call it a salary or remuneration of a manager then) of **Kshs.40,000/= leaving a NET income of Kshs.30,000/=** per month would be reasonable income for purposes of calculating loss of dependency in the absence of a definite income.

16. **The question of dependency ratio** has been interrogated in numerous decisions. The deceased left behind minor children and the plaintiff her husband at the date of her demise on 12<sup>th</sup> January 2007 as pleaded in the plaint. The defendants submitted that no evidence was led by the plaintiff to establish the extent of loss of dependency as claimed, and urged the court not to adopt the conventional  $\frac{2}{3}$  ratio, but a global sum of Kshs. 600,000/= as loss of dependency, and cited the case **Beatrice Mairu -vs- Hon. Ezekiel Bargetuny and Another HCCC No. 1438 of 1990 (unreported)**. Where the court expressed itself that:

*“there is no line of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.”*

I totally agree with the above court's opinion. Each case must be taken and decided upon its peculiar circumstances. The deceased had three minor children. She was only 34 years old when she unceremoniously left them. They no doubt lost their motherly love and the financial support she offered them. No reason has been advanced-to persuade me that  $\frac{2}{3}$  or more of her income was not going towards the support and welfare of the children. Two-thirds( $\frac{2}{3}$ ) shall be adopted as the dependency ratio.

#### 17. Damages under the Law Reform Act

The deceased died two hours after the accident. An award of Kshs.100,000/= for pain and suffering would be a reasonable sum while Kshs.200,000/= would be fair damages for loss of expectation of life under the **Law Reform Act**. In arriving at the above figures, I have considered the conventional sums awarded and the following authorities – **Alice O. Alukwe -vs- Akamba Public Bus Service (2013) KLR**, **Ndungu Mumbia Muhuha -vs- Katana Ngumbao Mwayele, Nakuru HCCC No 24 of 2014**.

The court notes that the deceased's dependents are the plaintiff and his children. These are the same beneficiaries who will inherit damages under the Fatal Accidents Act. To allow this benefit to them would amount to double compensation. It therefore has to be discounted. See **Kemfro Africa Ltd t/a Meru Express & Another -vs- A.M. Lubia (1982-88) I KAR 725** and followed in **Beatrice Wangauithairu (Supra)**.

#### 18. Special Damages

The plaintiff pleaded a sum of Kshs.116,110/= as special damages and particularised as funeral expenses

and fees for grant of Letters of Administration. A bundle of receipts in support were produced. Both counsel agreed on a sum of Kshs.91,055/= as proved special damages.

This sum is allowed.

19. In summary the court makes the following awards:

• **Damages under the Law Reform Act**

- (a) Pain and suffering - Kshs. 100,000/=
- (b) Loss of expectation of life - Kshs. 200,000/=

**Kshs.300,000/=**

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• **Under the Fatal Accident Act**

- (a) Multiplier(by consent) - 24 years
- (b) Multiplicand - Two-thirds ( $\frac{2}{3}$ )
- (c) Net income - 30,000/=

Loss of Dependency:

$$30,000 \times 24 \times 12 \times \frac{2}{3} = 5,760,000/=$$

$$\text{Add Special damages} = \underline{91,000/=}$$

5,851,000

$$\text{Less award under law Reform} = \underline{300,000/=}$$

5,551,000/=

$$85\% \text{ thereof} = \underline{\underline{4,718,350/=}}$$

The award on general damages shall earn interest at court rates from the date of this judgment while special damages accrues interest from the date of filing of the suit.

20. Costs of the suit goes to the plaintiff.

**Dated, signed and delivered in open court this 7<sup>th</sup> day of April 2016**

**JANET MULWA**

**JUDGE**