



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
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**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**HC.COMM. 518 OF 2011**

**EPHRAHIM MUTAHI MUTUNDE..... PLAINTIFF**

**VERSUS**

**RAPTURE SERVICES LTD**

**T/A RAPTURE BUS SERVICE..... DEFENDANT**

**JUDGMENT**

**Background**

1. On 23.9.2011 by a plaint dated 20.9.2011 the plaintiff sued the defendant and prayed for general damages under both the Law Reform Act as well as Fatal Accidents Act, Special damages of Kshs.326,748 together with costs and interests allegedly arising from a road traffic accident alleged to have occurred on 11.12.2010 in which one LAWRENCE MWARARI MUTAH died while travelling in a motor vehicle Registration No. KBA 689 G said to be owned and operated by the defendant.
2. When the matter came up for hearing on the 11.11.2014 the parties enter a consent on liability by which the plaintiff conceded that the deceased contributed to the accident at 35% while the defendant was to bear 65%. With that consent on record, what pends for determination is the quantum of damages due to the plaintiff. The next time the matter was in court on 10.3.2016, the parties recorded a further consent that the witness statements and bundles of documents filed by the parties be adopted as evidence and exhibits and that no oral evidence would be called and exhibits be deemed as duly produced. Parties then agreed that the question of quantum of damages be canvassed by way of written submissions which would be highlighted by the parties.
3. The date for highlighting having been set for the 27.4.2016, the Plaintiff filed written submissions on 6.4.2016, and additional list of authorities on 12.5.2016 while the defendant filed its submissions on 11.5.2016 ready for the highlights. On the date set, Ms.Osino appeared for the plaintiff while Mr.Asena appeared for the defendant.
4. For the plaintiff it was submitted that he was entitled to damages, under both Law Reform and Fatal Accidents Acts and the following proposals were made.

Pains & Suffering	Kshs.	100,000
Loss of expectation of life	Kshs.	300,000
Lost dependency	Kshs.	10,752,000
Special damages	Kshs.	326,748
Total		<b>11,478,784</b>

5. The Plaintiff relied on the decision in ALEXANDER OKUNDA -VS- REMB MUTUKU [2015] eKLR for the proportion that owing to the fact that the Plaintiff died on way to the hospital, after the injuries, a sum of Kshs.100,000 was reasonable as compensation.

6. On loss of expectation of life the plaintiff prayed for the sum of Kshs.300,000 and cited the decision in MWALA MWA GONGO -VS- KENYA POSTS AND TELECOMS HCC.NO.16 OF 1997 (MBS) where Hayanga J, awarded a sum of Kshs.150,000 in the year 2000.

7. On lost dependency, the plaintiff proposed a multiplier is 32 years against the known income of 42,000 and a dependency ratio of 2/3 to come to a sum of kshs.10,752,000 on this read of damages the plaintiff relied on PHILLIP MUSYOKA MUTUS -VS- VERONICA MBULA MUTISO MACHAKOS 108 OF 2008, BERLY WERYL WERE MALOWA -VS- KPA, MSS.NO. 246 OF 2009 and the decision on appeal for the same Judgment.

8. On its part Mr.Asena for the defendant only raised two issues namely:-

**(i) Where the court makes an award under both Law Reform and Fatal Accidents Acts then the same is offset against the other in that since the award for loss of dependency is likely to be higher than that for pains, suffering and loss of amenities, the award under pains and suffering and loss of amenities ought to be offset against that under loss of dependency.**

**(ii) Under The Insurance, (motor vehicle 3<sup>rd</sup> party risks) Amendment Act, 2013 the highest award the court can make is sealed called at Kshs.3,000,000 and no more.**

9. On loss of dependency Mr.Asena proposed a multiplier of 20 years and a dependency ration of ½, not 2/3 , and worked with net salary of the deceased. He therefore proposed a sum of kshs.2,806,169.

10. What is of note is that Mr.Asena in both his written and oral submissions did not refer the court to any decision as a basis for making his proposals. He preferred to wholly rely on the Amendment to the legislation an no more.

11. In order to bring the application and import of the Amendment Act into focus, Ms.Osino filed the said list of authorities dated 11.5.2016 in which the decision on the constitutionally of certain sections of the Amendment Act were questioned. That is the decision in LAW SOCIETY OF KENYA -VS- ATTORNEY GENERAL & 3 OTHERS [2016] eKLR. In it the court found and decreed that the Limit of Kshs.3,000,000 only applies to the furthest compensation an Insurer may go but not intended to garg the courts discretion on award of damages. Without contradicting the finding by Onguto J, in LSK -VS- A.G. and 3 others, and noting that the decision is only persuasive on this court, I find that to the extent that the ammendment seals awards at 3,000,000 it goes affront the very purpose for which the principal act was enacted to secure compensation to victims of road traffic accidents. The propriety of the amendment may still stand questions in the future. This court however in exercising its discretion in assessing damages has no duty to be guided by the amended to the Act. Its discretion must be exercised in an independent and unfettered way.

12. Having taken into account the pleadings offered, evidence in the statements admitted by consent, the documents produced and the submissions offered I determine the quantum of damages payable to the

Plaintiff as follows.

### **Pains and Suffering**

13. The plaintiff was injured at about 8.20 pm and died at Pandya hospital at about 11.00 pm while undergoing treatment. No evidence was led by either side that the plaintiff was unconscious not to feel agony inflicted by the injuries. I make the inference that between the time of his injuries and death he was alive and conscious of his conditions and suffered pain. This has not been challenged by the defendant neither has any material been placed before me to dissuade me from being persuaded by the decision in **Alexander Okunda** (supra). I award to the plaintiff the sum of Kshs.100,000 for pain, suffering and loss of amenities.

### **Loss of expectation of life**

14. Despite the preponderances and vicissitudes of life, every person who dies as a result of a tortious acts by another is deemed to have lost the life courtesy of the wrongful act leading to his death. Indeed the tortfeasor ought to bear the burden of his wrongful acts. In the instant case, death was by fault of the defendant to the extent of the liability apportioned by consent. The courts have now conventionally awarded damages under this heading ranging between 50,000/= to 200,000/=. That discretion like all other discretions must be exercised judiciously. Based on the material before court, I assess damages under the heading in the sum of kshs.180,000/= I have opted to depart from the decision in Mwala Magongo (supra) having taken into account the date it was decided.

### **Loss of dependency**

15. The monthly income of the deceased was pleaded and not contested to have been kshs.42,000/= nor was his age at the time of the death in dispute.

16. What is in contention is the multiplier to be used, the dependency ratio and whether the court adopts the gross or net salary as the multiplicand.

17. As Ringera J said in **KWANZIA -VS- NGALALI MUTUA & KENYA BUS SERVICES LTD:-**

***“The multiplier approach is just a method of assessing damages it is not a principle of law or dogma. It can and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where facts such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of dependency are known or are knowable without undue speculation.”***

18. In the matter before me I am persuaded that the multiplier approach is appropriate and noting that the only dependent to the deceased is the 73 years old father who as at the date of trial was said to have developed dementia and unable to give evidence. Dependency is always a matter of evidence and not a question of any conventional standards. It behoves a party/litigant to give evidence on the extent of its dependency to the deceased. For the matter before me the statements and documents filed do not reveal how much the deceased availed to the father as a dependant. It is therefore difficult to ascertain how much he received from the deceased as evidence of annual or monthly dependency lost as a result of the death.

19. It is however a matter to be taken judicial Notice of that in African set up, parents expect to depend on their children and indeed do exercise such dependency. The defendant having proposed, the ratio of ½ then in the absence of proof, I am of the opinion that the would represent a reasonable offer and proposal.

20. Another fact to be considered in applying the multiplier approach is the age of the dependant and therefore length of dependency. The dependent was aged 73 years and the proposal by the defendant of a multiplier of 20 years is not outrageous taking into account that to adopt the proposal by the plaintiff of 32 years would suggest that we would expect that dependant lives upto the age of retirement of the

deceased without considering his own reasonably outstanding expected lifespan.

21. Doing the best in the circumstances noting that the witness statement would have done better by giving additional information, I adopt a multiplier of 20 years and a multiplicand of 42,000 being the agreed monthly income of the deceased. I am inclined to use the gross monthly pay noting that the duty to assess and collect taxes must be remain where it is constitutionally resident, with the Kenya Revenue Authority. See **BERYL BETHA MAGOWA -VS- KPA** (supra).

The damage under the heading therefore work out as follows

$$42,000 \times 20 \times 12 \times \frac{1}{2} = 5,040,000$$

**Special Damages:**

22. The plaintiff pleaded the sum of **ksh.326,748** and was therefore bound to specifically prove the same. According to the list of documents filed and produced by consent, search fees, legal fees for obtaining grant and fees for death certificate were duly exhibited. However that sub-heading called funeral expenses needed better particulars and proof. No attempt was made in that regard.

23. I have however taken my time to scrutinise the receipts produced and have found that hospital fees and other receipts exhibited total to **kshs.361,598** which together with the particularised expenses of kshs.11,350, aforesaid, make an aggregate of **ksh.372,948**.

24. For that reason the sum I can award for special damages is that as pleaded and proved. The proof can not exceed the pleaded sum. I award **kshs.326,748**.

25. I have taken into account that this is one of those cases in which the awards under Law Fatal Act as well as the Law Reform Act vests in only one dependent as such dependant and administrator of the estate of the deceased. It is therefore one of those cases where the court must take into account the damage awarded under both acts and appreciate the fact that both go to the same person. I have duly taken account of that fact and note that the expression taking into account does not mean deduction as submitted by Mr.Asena.

26. The summary of my award is therefore as follows:

Pains & Suffering	Kshs.	100,000
Loss of expectation of life	Kshs.	180,000
Lost dependency	Kshs.	5,040,000
Special damages	Kshs.	326,748
<b>Total</b>	<b>Kshs.</b>	<b>5,646,748</b>
Less 35% contribution	Kshs.	1,976,361
Net due	Kshs.	3,670,387

27. I award to the plaintiff the costs of the suit and as well as interests on the damages and costs. Interests on special damages shall commence from the date of filing suit while interest on general damages and costs shall accrue from the date of this Judgment.

**Dated signed and delivered this 6<sup>th</sup> June 2016 in the presence of**

Ms.Lewa for Ikanda for Defendant

No appearance for the plaintiff.

**P.J.O.OTIENO**

**JUDGE**

Ms.Lewa; I seek a stay for 45 days to enable the defendant arrange payment of the sum awarded.

Court: It is this court's view and understanding that for execution in this matter to issue, order 21 Rule 8 would have to be complied with and costs need to be taxed and ascertained. Those processes would have to involve the defendant.

I therefore find that just as of today without a decree, a certificate of costs nor an order under section 94, there is no risk of an execution to warrant the court granting stay. I hesitate from granting gratuitous orders which are not called for by the circumstances of the case. The defendant is however at liberty to apply for stay if the circumstances shall demand at a future date.

**P.J.O.OTIENO**

**JUDGE**

**6/6/2016**