



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 526 OF 2000**

**RAHAB WANJIRU NDERITU..... PLAINTIFF**

**VERSUS**

**DANIEL MUTETI .....1ST DEFENDANT**

**NATION MEDIA GROUP LTD/NATION CARRIERS LTD.....2ND  
DEFENDANT**

**BENARD MUENDO KYENZE .....3RD DEFENDANT**

**HON. EKWE ETHURO.....4TH DEFENDANT**

**MUSYOKA NGUKU.....5TH DEFENDANT**

**JUDGMENT**

1. The plaintiff being the personal representative of the Estate of the Late Patrick Kamau Kahu, vide a Grant of Letters of Administration *ad Colligenda* issued in Nakuru HCCC No. 135 of 2000 on the 30th May 2000 sued for compensation in damages both under the Law Reform act and the Fatal Accidents Act following the death of the deceased in a multiple road traffic accident on the NakuruEldoret Road.

In her Amended Complaint dated 5th February 2013, she stated that the deceased was her husband, was an employee of Nation Media Group Limited, the second Defendant and a lawful passenger in the said company's motor vehicle Registration Number KAH 346W Isuzu Pickup which, at the material time was being driven by one Daniel Muteti, the first Defendant, also an employee of the second defendant. The suit against the said Daniel Muteti was withdrawn on the 3rd March 2015 as he was said to have died. He had been sued for negligence as the driver of the vehicle and on vicarious status to the second defendant, his employer.

2. On the fateful night, it is the plaintiff's claim that while on its way to Eldoret at Kerita bridge, motor vehicle Registration Number KAH 346W was involved in an accident with other two vehicles Registration Number KYS 677 Land Cruiser owned by the fourth Defendant Honourable Ekwe Ethuro then being driven by the third Defendant, Bernard Muendo Kyenze and another Registration No. KAA 057Z Scania Bus the property of the 6th Defendant and being driven by the 5th defendant, Musyoka Nguku.

The plaintiff blamed all the drivers for the three vehicles as stated were blamed for being negligent in the manner and control of their respective motor vehicles and their respective employers and owners of the said vehicles on vicariously status of their drivers negligence.

3. The claim was brought on behalf of the Estate of the deceaseds and dependants including the plaintiff (widow) 38 years old and two children then aged 20 and 16 years old.

4. Save for the third and fourth defendants who failed to appear, upon service, the first, second, fifth and sixth defendants filed their respective defences and blamed each other for negligence and causation of the accident. Interlocutory judgment was entered against the third and fourth Defendants on the 20th September 2007.

5. During hearing of the case before me, none of the drivers testified. As stated above the driver of the Nation Media Limited vehicle Registration No. KAH 346 W was said to have died and the case against him was withdrawn on the 3rd March 2015.

6. The Plaintiff's case is that her husband, the deceased, then 41 years old was earning a salary of Kshs.12,700/= per month excluding overtime payments and was in good health when he met his death through the accident at Kirita bridge, and that she identified the body at Eldoret hospital mortuary on the 17th January 1998 and buried him. She pleaded of Kshs.53,000/= as the burial expenses. The plaintiff produced as exhibits the following documents, having been filed in a bundle on the 24th April 2013 and others on the 17th November 2011.

- Death Certificate
- Letters of Administration *ad litem*
- Bundle of receipts for the month for Kshs.54,995/= being burial expenses
- Payslips for the month of September 1999
- Police abstract
- Extract – Nation Newspaper dated 15th January 1998
- Inquest No 9 of 1999 proceedings at Eldoret
- Demand letter dated 8th September 2000
- Statutory notice addressed to Pan African Insurance Company Limited dated 8th September 2000 and to Occidental Insurance Company of even date, and another to Nation Media Group.

The plaintiff urged the court to order compensation against all the defendants as she could not tell the court who among the three drivers and vehicles was to blame for the accident as she did not witness the accident.

7. PW2 Essau Nderitu Wamweya is a brother in law of the plaintiff. He testified that on the fateful night, he had met the deceased at Nakuru and one hour after also left for Eldoret in a bus only to find the vehicle the deceased was travelling in at Kerita Bridge having been involved in an accident with the other two vehicles. He confirmed that one Daniel Muteti was the driver of the first Defendant vehicle Registration Number KAH 346W at Nakuru while the deceased was seated at the passenger seat. He then informed the plaintiff who proceeded to the accident scene. He could however not confirm who was driving the vehicle at the time of accident but testified that at Nakuru, it was the said Daniel Muteti who was driving.

8. In his written submissions, the plaintiff's advocate Mr. Muguku urged the court to find that the said accident that caused the death of the plaintiffs husband, was caused and contributed to by all the defendants drivers jointly and severally.

He computed compensation under **Fatal Accidents Act** at Kshs.2,917,716/= adopting a salary of Kshs.12,797/= and a multiplier of 19 years.

He further computed **lost dependency at Kshs.2,052,000/=** on the basis that the deceased used Kshs.9,000/= from his salary of Kshs.12,797/= on his dependants the widow, and the two children monthly.

He also urged that the special damages pleaded and proved at Kshs.53,670/= be allowed.

9. Under the **Law Reform Act**, it was his submission that Kshs.300,000/= be awarded for pain and suffering and Kshs.100,000/= for loss of expectation of life.

Reliance was had to several authorities, among them **CA No. 186 of 2009 Tabitha Nduku Kinyua vs Francis Mutua Mbuvi and Corner Garage Transport Limited**.

10. The second defendant, Nation Carriers Limited/Nation Media Group Limited filed its submissions through its Advocate J.G. Kagucia. The defendant is sued in vicarious status by dint of negligence attributed to its driver, the first Defendant Daniel Muteti the alleged driver of its motor vehicle being Number KAH 346 W. It is noted that the suit against the driver Daniel Muteti was withdrawn on the 3rd March 2015 after his demise.

It is submitted that in the absence of the driver of the motor vehicle, then no liability can attach to the owner of the vehicle, the second defendant and therefore no case lies against the said second defendant.

It was its further submission that the second defendant in its defence blamed the third and fifth defendants for causing the accident and/or substantially contributed to its occurrence and the 4th and 6th defendants being vicariously liable.

11. On dependency, it is submitted that the plaintiff failed to prove that she was indeed the widow of the deceased as no marriage certificate was produced, and also failure to produce the Childrens' birth certificates and therefore loss of dependency was not proved.

On liability, the second defendant submitted that no liability was established against it as no eye witness was called to testify nor any explanation tendered on how the accident occurred and therefore the burden of proof was not discharged but was in an agreement that the accident occurred involving three motor vehicles.

12. On the issue vicarious liability, the second defendant submitted that the plaintiff failed to prove the same against the second defendant particularly when she withdrew the suit against the first defendant, the driver of the Nation Media Van. It is further submitted that the second defendant exonerated itself from any liability by challenging liability in its defence and that since the third and fourth defendants failed to appear to defend themselves in court, and pursuant to provisions of **Order 12 Rule 5 of Civil Procedure Rules, 2010**, liability should then be apportioned between the two defendant solely.

13. On *quantum* of damages, the second Defendant submits that no award ought to be made under the Law Reform Act as no evidence was lead on how long the deceased lived after the accident before the death, but proposes a sum of Kshs.70,000/= damages for loss of expectation of life.

14. Under the Fatal Accidents Act, it is submitted that dependency was not proved and that as the deceased died at 41 years, a multiplier of not more than 14 years against a Net salary of Kshs.6,162/= may be applied. In its totality, the second defendant urged dismissal of the plaintiff's case against it for failure to prove negligence against it. Several authorities were relied on among them, the following:

**Abbay Abubakar Haji Fatuma vs Masair Freight Agencies (1984) e KLR, Francis Njoroje Njonjo vs Irene Muroki Kariuki & Others (2007) e KLR and Wesley Kipyegon Mutai vs Kipkelion Town Cout Y Another (2009) e KLR.**

15. The fifth, and sixth Defendants filed their submissions by their Advocates Murimi, Ndumia, Mbago and Muchela Advocates. It is submitted on their behalf that no negligence was proved against the two defendants as no eye witness was called to state what the defendants did or did not do that caused the accident. Relying on the case **Lucy Muthoni Munene vs Kenneth Muchange & KBS Ltd – Nairobi HCCC No. 853 of 1988**, it was urged that as no evidence was adduced from

which the court can find the defendants liable, the suit against the said defendants should be dismissed. It was also submitted that should the court find negligence on the fifth and sixth defendants, then a proposal on damages for pain and suffering under the Law Reform Act of Kshs.120,000/= would be adequate while loss of dependency of Kshs.864,000/= upon an income of Kshs.12,000/= per month and multiplier of 9 years and a 2/3 multiplicand were proposed.

16. I have analysed the evidence by the plaintiff and submissions by all counsel.

There is no dispute that an accident occurred involving the three vehicles registration Numbers KAH 346W, a Nation Media Van, KYS 677 a Land Cruiser owned by the Hon. Ekwe Ethuro and motor vehicle Registration Number KAA 057Z a Scania Bus owned by the Akamba Bus Service Limited. It is also not in dispute that the driver of the Nation Media Van Daniel Muteti is dead while the driver and owner of the Land Cruiser, the third and fourth defendants failed to appear or file their defences.

It is confirmed that there is already interlocutory judgment against the said third and fourth defendants. It is also not in dispute that the driver of the Akamba Bus failed to attend court to testify and shed some light on the occurrence of the accident.

The court notes that an inquest was opened, in **Inquest No. 99 of 1999** at the Senior Principal Magistrate's Court at Eldoret to find out possible cause of the accident but the same was closed due to lack of witnesses.

17. As matters stand, the possible cause of the accident remain unknown.

What came out during the proceedings and submissions by counsel is that each of the parties blamed each other for the occurrence of the accident. The deceased who was a lawful passenger in the second defendant's vehicle, and lost his life due to the negligence of all or either of the six defendants in the suit. No eye witness was called to testify on the possible cause of the accident. No body attended the Inquest to shed light on the occurrence of the accident.

18. It is trite that where there is a collision of two or more vehicles, proof of a collision is held to be sufficient to call on the two drivers for an answer or explanation.

In the case **Francis Njoroge Njonjo and Another vs Irene Muroki & Others (2007) e KLR**, the court in following **Lord Denning's Remarks in Baker vs Market Harborough Industrial Co-operative Society Ltd (1958) 1 WLR** observed:

***“Everyday, proof of collision is held to be sufficient to call on the two defendants for an answer. Never do they escape liability. One or the other is held to blame. Sometimes both. If each of the drivers were alive and neither chose to give evidence the court would unhesitatingly hold that both were to blame.”***

19. In the present case, all the defendants filed their defences blaming each other save for the third and fourth defendants. Interlocutory judgment is in place against the two defendants.

The deceased being a passenger could not possibly be to blame as he had no control of the vehicle, and no allegations of contributory negligence were levelled against him.

The question for the court to answer is whether proof of the multiple vehicle collision in the accident was and of itself proof that one or all of the drivers involved were negligent. None of the drivers testified in this court or at the inquest. There being no evidence tendered and there being no evidence upon which the court can draw a distinction between the three drivers, the only justifiable conclusion is to hold all of them to blame. The above sentiments were expressed in the case **Francis Njoroge Njonjo & Another vs Irene Muroki Kariuki and Another (2007) e KLR**.

20. I have stated above that there is on record interlocutory judgment against the third and fourth defendants entered on the 20th September 2007. They did not challenge the suit against them either by pleadings or evidence. All the other defendants challenged the suit through their pleadings. To that extent, the third and fourth defendants must be held to blame on a higher contribution on negligence than the others.

It is not in dispute that the plaintiff failed to testify on the negligence of either of the defendants, and for good reason, that she was not an eye witness. Neither of the defendants called any eye witnesses. Circumstantial evidence however abounded that there was indeed a multiple collision of vehicles from which the deceased sustained fatal injuries.

As stated in the case **Lucy Muthoni Munene -vs- Kenneth Muchangi & KBS (Supra)**, and in line with the provisions of **Section 107 and 108** of the **Evidence Act, Chapter 80 Laws of Kenya**, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The burden of proof lays on the plaintiff who must show that the loss is to be attributed to the negligence of the defendants, by adducing evidence from which it could be inferred that on a balance of probability the defendant is negligent.

As I have stated above, no evidence was tendered by the plaintiff in discharge of the burden of proof. Should the failure by the plaintiff to testify on the manner of negligence by the defendants, taking into account that she was not an eye witness render her case unsustainable?

21. It is common knowledge and trite that collisions between vehicles do not just happen. One or both drivers must be negligent for an accident to happen. An explanation ought to be given for the accident by the drivers. Either the drivers were not in proper control of the vehicles, did not obey traffic rules, failed in one way or another to avoid the accident or drove carelessly without due regard and care to other road users or drove at an excessive speed in the circumstances, thus causing the accident.

In the case **Patel vs R (1968) EA 97**, it was stated that when vehicles are normally driven at reasonable speed, certain things do not just happen. Even if the vehicle was being driven on a wet road, that by itself would not cause it to swerve and onto the path of an oncoming vehicle. As no evidence was tendered in this case, the court is unable to decisively attach full blame on either of the vehicles. In view of the circumstances appertaining hereto, the court after a careful consideration of the entire scenario and submissions, makes findings, in its discretion and based on the available evidence and submissions that the three drivers of the respective vehicles were to blame, albeit at different contributory ratios as justified by the circumstances.

22 The second defendant is held vicariously liable in negligence of its driver, the first defendant (now deceased) at 20%.

The third and fourth defendant shall shoulder contributory negligence at 60%, while the fifth and sixth defendants shall shoulder 20%. The above apportionment of liability is arrived at due regard to the special circumstances in this case. See **Francis Njoroge Njoroge Case (Supra)**.

### 23. Special damages

The plaintiff pleaded a sum of Kshs.53,670/= being funeral expenses. In her evidence before the court, the plaintiff testified that the second defendant and employer of the deceased met the funeral expenses by providing the cost of the coffin, transport and mortuary fees.

I have seen the bundle of receipts (PEXh 3). They represent transport of mourners from Nairobi to Nyeri and cost of food for the mourners and other miscellaneous expenses.

I have seen a court receipt for the petition for Letters of Administration *Ad Litem* and fees to the Advocates amounting to Kshs.20,925/=.

I shall allow the sum of Kshs.20,925/= only as a genuine expense. All other necessary expenses and costs having been met by the second Defendant, I disallow the sum of Kshs.53,670/= as awarding it would amount to double compensation to the plaintiff and beneficiaries.

#### **24. Damages under the Law Reform Act**

I fully agree with the Defence Advocates submissions that no evidence on how long the deceased lived after the accident before his demise was stated. For that reason, there shall be no award for pain and suffering.

**25 On loss of expectation of life**, the conventional sum is currently between Kshs.100,000-250,000/=

See **Francis Njoroge Njonjo (Supra) and George Wangang'a vs Austine Mwangale Khaemba & Others. Hccc No 487 of 2000 at Nakuru.** I shall award a sum of Kshs.150,000/=.

See also **Benedetta Wanjiku Kimani vs Changwon Cheboi & Another (2013) e KLR.**

#### **26. Damages under the Fatal Accident Act**

**Section 4(1) of the Fatal Accidents Act** states that

***“every action brought under the Act shall be for the benefit of the wife, husband, parents and children of the deceased whose death was so caused.”***

The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth of certificates or any other documents to confirm the same.

The plaintiff did not produce any of the above documents to confirm being a wife and widow of the deceased. I have looked at the Grant of Letters of Administration issued in the **Nakuru High Court** vide **HC P&A No. 135 of 2000.**

The plaintiff's names appear as Rahab Wanjiru Nderitu as the petitioner while the deceased's names appear as Patrick Kamau Kahu. These names do not give the court a hint on whether the petitioner was wife to the deceased. No documents were produced whatsoever to show a nexus between the children and the deceased.

Indeed, on cross examination by the defence counsel, the plaintiff confirmed that though married to the deceased and had a marriage certificate, she did not produce it as an exhibit nor did she produce the Chief's letter and the children birth certificate or documents and no explanation was tendered for the failure.

**27.** Any person who has a beneficial interest or otherwise in a deceased's estate may apply for grant of Letters of Administration. It is not always that the person so applying is a wife or husband, or indeed a relative of the deceased. Stating in evidence that one is a wife or husband of a deceased person without proof is not enough. If the plaintiff was indeed the widow of the deceased as she stated, it would have been very easy for her to produce the marriage certificate she alluded to, or event the chief's letter to confirm customary marriage and the children's documents, say Baptismal

certificates or school certificates. The above having not been done, the court is left with no option but to find that dependency has not been proved, following which no award on loss of dependency can be made.

However, had dependency been proved, I would have assessed damages for loss of dependency as follows:

The deceased was 41 years old at time of death. He would in the absence of vicissitudes of life worked for 19 years to reach the official Government retirement age of 60 years. His net salary considering his payslips for the months September 1997, October 1997 and December 1997 was Kshs.5,358/= plus house allowance of Kshs.804/= making a Net salary of Kshs.6,162/=. I would adopt a multiplier of 16 years against a multiplicand of 2/3 thus  $12 \times 6,161 \times 16 \times \frac{2}{3} = 788,736/=$ .

**In Benedetta Wanjiku Kimani vs Changwon Cheboi & Another (2013) e KLR** the court adopted a multiplier of 16 for a deceased man who died aged 44 years.

28. For the above reasons, there shall be judgment entered for the plaintiff against the defendants jointly and severally as follows:

1. Liability is apportioned among the defendants in the following ratios:

**First and Second Defendant 20%**

**Third and fourth Defendants 60%**

**Fifth and 6th Defendants 20 %**

2. Damages under the Law Reform Act

**Pain and Suffering Nil**

**Loss of expectation of life Kshs.150,000/=**

3. Loss of Dependency nil

(not proved)

4. Special damages Kshs.20,925/=

5. Costs of the suit shall be borne by the defendants at the ratios of apportionment of liability stated in (1) above.

6. Interest on special damages shall accrue from the date of filing the suit while interest on general damages shall accrue from the date of this judgment.

**Dated, signed and delivered in open court this 14th day of July 2016**

**JANET MULWA**

**JUDGE**