



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CIVIL SUIT NO. 191 OF 2013**

**FRANCIS WAINAINA KIRUNGU**

**(suing as personal representative of the estate of**

**John Karanja Wainaina) DECEASED.....PLAINTIFF**

**VERSUS**

**ELIJAH OKETCH ADELLAH.....DEFENDANT**

**JUDGMENT**

1. The plaintiff has filed this suit as the administrators of the estate of the late John Karanja Wainaina “the deceased” who died on 17<sup>th</sup> August 2012. He has brought the suit on behalf of the estates of the deceased and on their own behalf as the dependants of the deceased and pursuant to the Law Reform Act Cap 26 and the Fatal Accidents Act Cap 32 laws of Kenya.

2. The plaintiff alleges that on 17<sup>th</sup> August 2012, the deceased was lawfully pedal cycling his bicycle along baba dogo when at police post or thereabout the defendant or his authorized driver so negligently drove, managed and/or controlled motor vehicle registration number KAT 810J Toyota Hiace that he caused or permitted the same to lose control and violently collide with the deceased. He particularized the defendant negligence as follows; Driving at a speed, which was excessive in the circumstances; driving without due care and attention; failing to exercise or maintain any sufficient or adequate control of the said motor vehicle registration number KAT 810J Toyota; failing to keep any proper lookout or have any sufficient regard to other traffic on the said road and in particular deceased cyclist; failing to give any or adequate warning of his approach. Causing and/or permitting the said motor vehicle registration number KAT 810J to collide with the deceased cyclist; failing to stop or slow down swerve or in any other way so to manage or control the said motor vehicle as to prevent the accident.

3. As a result of the said accident the deceased sustained fatal injuries and died. At the time of the said accident the deceased was 28 years and enjoyed a healthy and vigorous life of a young man and was a sales man cum businessman earning about Kshs.1,500/- per day. He sought general damages and special damages of Kshs. 128,655/- plus cost of suit.

4. The defendant in his defence dated 18<sup>th</sup> June 2013, contends that the plaintiff had no locus standi to file suit on behalf of the estate of the deceased and put him to strict proof thereof. He denied being in possession and/or the registered owner of the motor registration number KAT 810J and that the accident occurred on 17/8/2012 along baba dogo involving the motor vehicle registration KAT 810J. He avers that if the accident occurred the same was caused by the negligence or substantially contributed by the negligence on the part of the deceased. He particularized the deceased’s negligence as follows; Failing to

keep any or proper look out on the said road; cycling into the path of the motor vehicle registration number KAT 810J; cycling into a busy road when it was not safe to do so; failing to take note of the defendant's driver's warning; colliding into the motor vehicle registration KAT 810J failing to use the designated path for pedestrians; cycling a defective motor cycle. He further denied that the deceased suffered the fatal injuries or special damages as claimed and denies having been served with any demand notice prior to filing this suit.

5. PW1 Eliud Mundia Ngure a friend to the deceased and an eye witness to the accident testified that the deceased was peddling the bicycle and was a pillion passenger along Baba Dogo road when a vehicle registration number KAT 810J which was being driven along the same side . The driver tried to overtake while speeding but other motorists refused to give way forcing him to swerve off the road to their side. He went off the road and hit them. He stated that the van was being driven in a zig zag manner along the said road. The defendant was charged with dangerous driving.

6. On cross examination by Mr. Mwangi for the defendant. He affirmed that the deceased was his friend whom he had known for more than 5 years. That the deceased was escorting him when the accident happened; that he was cycling off the road and there were other vehicles on the pavement. He stated that it was a Nissan that hit them. He testified that the accident occurred at around 6.30 p.m. that he just saw the lights before they were hit and that the vehicle was coming from the opposite direction. That when it was denied way to overtake and as it was avoiding hitting other vehicle it went to their side. He restated that the deceased was beside the road and did not enter the road.

7. PW2 Francis Wainaina Kirungu the father testified that he was a business man and used to be assisted by his son who used to send him Kshs.10, 000/- every end month which he used to educate the deceased's other siblings. He added that he also farmed and kept a few chicken. He sought compensation as prayed in the plaint.

8. On cross examination by Mr. Mwangi. He denied knowing how much the deceased was earning adding that he did not keep a record of the money he used to send him. He testified that he had some receipts for the school fees paid but added that he had lost some.

9. PW3 Christopher Kamau, the deceased's younger brother testified that he was in partnership with the deceased supplying milk in wholesale to shops and kiosks in Baba Dogo. They were subcontracted by Kinagop Dairy Limited and were paid on commission at Kshs. 36/- per crate. They supplied between 50-80 crates depending on the time of the month and day of the week. With most sales at end month. On average he stated each one of them used to make between Kshs. 1,200/- and Kshs. 1,500/- per day. The deceased was not married and used most of his income to support his old parents and assisting them to pay fees for his younger siblings.

10. On cross examination he reiterated that he worked with the deceased selling milk and that the business was registered in his name. That he paid the City Council and had no other business documents adding that the deceased used to earn a salary and produced invoices.

11. On re-examination he testified that the milk they sold was his and they also sold crates to the shops with the deceased. adding that he would give him 30 crates and he would keep the money and that he used to sell 50 to 80 crates each day and he could get Kshs. 36 per crate and could get between Kshs.1, 200/- to Kshs.1, 500/- per day. He testified that he started the business and the deceased joined him later.

12. DW1 Elijah Oketch testified that it was a motor vehicle that was involved in an accident which predicated to this case. he testified that he was driving at 60 kph keeping left when suddenly a motor cyclist entered the road and he slightly shifted to the right to avoid knocking other motorists. He further stated that there was also oncoming cyclist who had a pillion passenger and the pillion passenger jumped and fell on the road he applied emergency brakes and it was too close and he was hit by his motor vehicle. He later on recorded a statement at Ruaraka Police station. He blamed the cyclist.

13. On cross examination by Miss Obanga for the plaintiff he stated that the accident that took place was

between his motor vehicle and the deceased, he blames the motor cycle and admitted that he was charged in court.

## **SUBMISSIONS**

14. On liability the plaintiff submitted that PW1 gave candid evidence on how the accident occurred and reasons as to why the driver of KAT 810J was to blame. The police abstract and charge sheet showed that the defendant was charged with the offence of causing death by dangerous driving, in traffic case no. 12336 of 2013; that the defendant's evidence did not add up to his filed defence and there was no mention of a third party. The defendant had alleged there was another motor cycle involved in the accident and the same was not mentioned in the defence and/or police abstract. He also alleged that another driver was charged in court but did not adduce evidence to that effect. The plaintiff urged the court to find the defendant 100% liable based on the evidence on record.

15. On Quantum of Damages it was submitted that the deceased was aged 28 years, earned an income of Kshs.1, 200/- per day. That the Dependency should be 2/3 or Kshs. 20,000/- and proposed a multiplier of 35 years.

16. It was further submitted that from evidence by the deceased's brother showed that the deceased was taking care of his siblings and old parents; that though the plaintiff did not adduce any documentary evidence on the deceased's income, PW3 had adduced his documents which gave the court an idea on the deceased's income and that it was unrealistic to expect the case to be proved by documentary evidence in support of earnings and/or income and the courts have to treat each case as it is presented to the courts. On this he relied on the case of **JACOB AYIGA & ANOTHER –VS- SIMON OBAYO** (suing as the personal representative of the estate of **THOMAS NDAYA OBAYO KISUMU CIVIL APPEAL NO. 167 OF 2002**. *Where the Court of appeal held, "we do not ascribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally production of documents. That kind of stand would cause a lot of injustice to very many Kenyans.*

17. It was argued that the defendant did not rebut the evidence on the deceased's income. That the deceased having been 28 years old his income would have increased with passage of time and that the court should consider the evidence by his brother who know what the deceased used to earn.

18. On Dependency the plaintiff proposed a conventional ratio of 2/3 or Kshs. 20,000/- per month a sum he argues was not rebutted by the defendant and the same was the amount the plaintiff stated he used to receive from his son. It was argued that the deceased as per the death certificate was a healthy young man and could have lived to the ripe age of 70 years. Factoring in the vicissitudes of life the deceased would have retired at the age of 60 years and proposed a multiplier of 35 years. On this the plaintiff relied on the case of **MILDRED AORI ODUNGA (suing as personal representative of the estate of Gilbert Silvano Morumbase (deceased) –VERSUS- HUSSEIN DAIRY, KISII HCCC NO. 24 OF 2009 (UR)(2010) ECLR**, where the court applied the multiplier of 32 years where the deceased was aged 28 years and a dependency ratio of 2/3 and awarded general damages for pain and suffering to the estate under the Fatal Accident Act.

19. On special damages, the plaintiff sought funeral and hospital expenses amounting to Kshs.101,770/-, mortuary bill Kshs. 5,100/- funeral Kshs. 96,670/- further claimed for expenses for conducting a search at KRA, taking out letters of administration and death certificate.

Under Law Reform Act, it was submitted that under this heading normally the courts award a conventional figure dependent on the age of the deceased. He relied on the case of **Daniel Kuria Ng'an'ga –vs- Nairobi city Council (2013) eCLR** where it was held that the age of the deceased is material in an award for loss of expectation of life. In the case of **PATRICIA MONA & DENNIS ANTHONY MUSYOKA** (suing as personal administrator of the estate of Anthony Musyoka) –versus- **SAMUEL OPOT OMONDI & NATIONAL ENVIRONMENT AUTHORITY, NAIROBI HCCC NO. 574 OF 2010**, where the Court awarded Kshs. 120,000/- for a deceased aged 47 years; and in the case of

**VIOLET JEPTUM RHAHELI –VS- ALBERT KUBAI MBOGORI (2013)** a deceased aged 44 years was awarded Kshs.150,000/- and urged the Court to award Kshs. 200,000/-.

20. On pain and suffering it was submitted that Kshs. 50,000/- was just and fair in the circumstances that section 2(5) of the Law Reform Act Cap 26, laws of Kenya. *“(5)the right conferred by this part for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any of my rights conferred on dependents by the Fatal accident Act or the carriage by Air Act 1932 of the United Kingdom.”*

21. It was submitted that the beneficiaries under Law Reform Act and Fatal accident Act are not the same and there will be no double benefit in any event and as such no deductions should ensue.

22. The defendant submitted that the duty to prove blame remains with the plaintiff and it is not enough for the plaintiff to throw facts to the court and leave it to the Court to make out a claim against the defendant. Should he fail to discharge the burden of proof he's claim must fail. It was submitted that PW1 was out to help a friend at the expense of giving a true account of the events leading to the accident. PW1's evidence was self-contradictory making it hard to believe. In his testimony he testified that the vehicle was forced out of the road to avoid a collision. That he testified that the vehicle was being driven in a zig zag manner and was unable to overtake then claim that the car hit the deceased whilst overtaking. He submitted that PW1 was coached to assist the plaintiff's case. Further he sought to infer blame on the defendant on the fact that he was charged which he argued was not enough to prove blame. It was submitted that the plaintiff had failed to make out a case of liability against the defendant and at best the Court can only apportion blame equally on the parties.

23. On Loss of expectation of life it was submitted that as the deceased was 28 years when he died he proposed an award of Kshs. 70,000/- and Kshs.10,000/- for pain and suffering since the deceased died soon after the accident.

24. The defendant proposed a dependence ration of a third on the multiplicand and argued that there was no evidence to show how much the deceased was earning as the evidence was not consistent and no documents were adduced to prove the deceased was earning Kshs.1,500/- and the receipts adduced were not in the names of the deceased neither were there documents presented to show that the milk sale business was a joint venture. He submitted that no proof of professional qualification and proposed that the deceased be treated as an unskilled laborer and apply Kshs. 5,000/- per month. Considering the vagaries of life he proposed a multiplier of 15 years. In total he submitted that the deceased be awarded - Kshs.5,000/- x 12months x 1/3 x 15 = Kshs. 300,000/-. The defendant relied on the case of **NELSON NAMU ELIJAH –VS- JAMES NGANGA MBAU & 3 OTHERS**, where the deceased a married teacher at the time of his demise was awarded Kshs. 20,000/- and Kshs.70,000/- for pain and suffering and loss of expectation of life respectively.

25. I have carefully considered the entire evidence and written submissions of the plaintiff and the defendant. I have considered the evidence of the eye witness and I do not find that he was out to help his friend. He narrated how the accident happened that it was the defendant's vehicle that came towards their direction as he avoided a collision. The defendant in his defence blames another party on the road for the said accident but he did not initiate any 3rd party proceedings against the said person. He can therefore not lay blame on the third party in order to wriggle out of his responsibilities towards other road users. The defendant in his testimony stated that he swerved the vehicle to avoid a collision with another oncoming vehicle and this is what led him to hit the deceased. In discharging the burden of proof on a balance of probabilities this Court is guided by the case of **Wareham t/a A.F. Wareham & 2 others -Vs- Kenya Post Office Savings Bank (2004) 2 KLR** where it was held that, *“The burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”* On account of the foregoing evaluation of the evidence, I am satisfied that the plaintiff discharged his burden of proof on a balance of probabilities in that the accident occurred and the deceased suffered fatal injuries that led to his

demise. The plaintiff has adduced a police abstract dated 13/09/2012 which detailed the place, time and parties involved in the said accident. The defendant DW1 in his testimony stated that once the accident occurred he left his vehicle at the scene and went to report the matter at the police station.

26. I find that the defendant failed to keep a careful watch of other road users and find the defendant to be 100% to blame for the causation of the accident that led to the demise of the deceased. The deceased did not contribute to the accident in my view as he was on the path where he was supposed to be. The defendant therefore bears 100% liability.

27. The defendant has challenged the plaintiff's capacity to institute this case. In his supporting documents I find that the plaintiff had taken out letters of administration for the estate of the deceased on 2<sup>nd</sup> April 2013 as such I find that the plaintiff indeed had capacity to institute this suit being a representative of the deceased.

28. It is trite law that special damages must not only be claimed but also proved. The plaintiff has claimed in the amount of Kshs. 128,655/-. On this he has receipts. There are receipts proving the taking out of grants of letters of administration totaling to Kshs. 26,235/-. The plaintiff must have incurred burial expenses the annexed receipts to prove the same I therefore award him the Kshs. 96, 670/-. The search at KRA and death certificate costs have also been proved. I find that the plaintiff proved the special damages claimed amounting to Kshs. 128,235/- and I award the same.

29. For loss of expectation of life the plaintiff has proposed Kshs.200,000/- while the defendant has proposed Kshs.70,000/-. The plaintiff died at 28 years he was a young man with promise. I find the sum proposed by the defendant is too low and award the plaintiff Kshs. 100,000/- as loss of expectation of life.

30. On pain and suffering the plaintiff has proposed Kshs. 50,000/- while the defendant has proposed Kshs. 10,000/-. The deceased died shortly after the said accident and I find that he did not suffer greatly. I find that the sum Kshs.50,000/- is sufficient for pain and suffering.

31. It is not in dispute that the deceased died at the age of 28 years and was not married. On this the plaintiff proposed 2/3 as the deceased was supporting his old parents and was paying school fees for his siblings whilst the defendant proposed 1/3 dependence ratio. The plaintiff being unmarried must have assisted the parents. In my view a ratio of a third dependence is appropriate considering that he had a sibling he was in partnership with. The plaintiff's evidence was that he was earning Kshs. 1,500/- however the defendant argued that the receipts adduced were not in the names of the deceased and no documents were presented to show that the alleged figures were in fact profit or income nor was there any documents that there was a joint venture with the deceased. In this regard the defendant proposed that the deceased be treated as an unskilled laborer and proposed an award of Kshs. 5,000/- per month. Guided by the Court of Appeal's holding in the case of *Jacob Ayiga & Another –vs Simon Obayo (supra)* I find that though the amount earned by the deceased has not been proved am guided by the evidence of the brother whom they were in partnership with and find that the sum of Kshs. 10,000/- is reasonable to be considered as the sum he earned per month.

32. On the multiplier considering the vagaries of life the plaintiff proposed a multiplier of 35 years while the defendant proposed 15 years. I find that the deceased died at 28 years assuming he was in employment he would have retired at 65 years. Putting into account the vicissitudes of life I give the deceased 60 years. I will adopt the multiplier proposed by the plaintiff of 35 years. This therefore works out as follows;  $1/3 * 12 * 10000 * 35 = \text{Kshs. 1,400,000/-}$ . The plaintiff has been awarded Kshs. 100,000/- under the Law Reform Act, for pain and suffering Kshs. 50,000/- and special damages Kshs. 128, 655/-. Total is **1,478,655/-**

33. It is an accepted principle of law that a deceased's estate should not benefit twice from the same accident by awarding both damages under the Law Reform Act as well as the Fatal Accidents Act where the benefits will be inherited by the same dependants. On this I rely on the case of *KEMFRO –VS- (A. M. LUBIA) and OLIVE LUBIA (1982-1988) KAR 727* where that court inter alia said -

*“.. The net benefit will be inherited by the same Dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.”*

Therefore I deduct the Kshs. 100,000/- under the Law Reform Act from the award of Kshs. 1,528,655/-. I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs. 1,478,655/- with interest at court rates from the date of judgment until payment in full. Costs to the plaintiff.

Orders Accordingly.

Dated, signed and delivered this **6<sup>th</sup>** day of **February** 2015.

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk