



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL CASE NO 303 OF 2011**

1. MNM
2. FM

**(Administrators of the estate of Bernard Mbugua, Deceased).....PLAINTIFFS**

**VERSUS**

**SOLOMON KARANJA GITHINJI.....DEFENDANT**

**J U D G M E N T**

1. The 1<sup>st</sup> Plaintiff is the widow of the late **BM** (hereinafter called the **Deceased**). The suit is a claim for damages in negligence on account of the death of the Deceased. The Plaintiffs seek damages under the **Law Reform Act, Cap 26** for the benefit of the estate of the Deceased and under the **Fatal Accidents Act, Cap. 32** for the benefit of the Deceased's dependants named in paragraph 7 of the **plaint dated 25<sup>th</sup> July, 2011**. They also seek special damages (which include material damage).
2. The Deceased died in a road accident on 20<sup>th</sup> August, 2010 involving motor cycle **KMCB 357K** which he Deceased was riding and the 2<sup>nd</sup> Defendant's motor vehicle **KAM 430S** which he was driving. The Plaintiffs blame the 2<sup>nd</sup> Defendant for the occurrence of the accident. Particulars have been pleaded.
3. The 2<sup>nd</sup> Defendant in his statement of defence denied the Plaintiff's claim and blamed the Deceased for the accident. Particulars were pleaded.
4. On 14<sup>th</sup> May, 2012, the suit against the 1<sup>st</sup> Defendant was withdrawn by consent with no orders as to costs.
5. Plaintiff testified as PW1. She adopted her witness statement dated 25<sup>th</sup> July, 2011 as her testimony-in-chief. She also produced in evidence her list and bundle of documents dated 25<sup>th</sup> July, 2011, save for the **post mortem** report of the Deceased which was later admitted in evidence by consent of both parties on 30<sup>th</sup> June 2014. The Plaintiff was not an eye-witness to the accident.
6. PW1 stated that following the accident, the Deceased was admitted at **Kenyatta National Hospital** where he died on 21<sup>st</sup> September, 2010 while undergoing treatment. She further testified that the Deceased was a butcher who was running his butchery business in **Kayole, Nairobi**. She produced a local authority licence from the veterinary department to prove the same. She stated that the Deceased's daily income from the butchery business was KShs. 2,000/00. He was aged 46 years at the time of his death

and enjoyed good health. He was the sole bread-winner of his family comprising PW1 and their four children.

7. The Plaintiffs called two other witnesses (PW2 and PW3), both police officers. The substance of their testimonies was that the 2<sup>nd</sup> Defendant himself reported the accident to the police in the evening of the day it occurred; that the 2<sup>nd</sup> Defendant explained that he had not reported the accident earlier because he had spent the whole day attending to the Deceased at ***Kenyatta National Hospital***; that the 2<sup>nd</sup> Defendant was to blame for the accident as the point of impact between the Deceased's motor cycle and the 2<sup>nd</sup> Defendant's motor vehicle was in the middle of a service road running parallel to the highway from which the 2<sup>nd</sup> Defendant had branched and should therefore have stopped and given way to the Deceased who was riding on the service road; and that the 2<sup>nd</sup> Defendant had not been prosecuted for causing death by dangerous driving because the police had not yet received the Deceased's ***post mortem*** report. In cross-examination, PW3 (who investigated the accident) said that when he visited the accident scene it had already been interfered with by passing traffic, but that he formed the opinion that the 2<sup>nd</sup> Defendant was to blame for the accident from eye-witness accounts (including the 2<sup>nd</sup> Defendant himself) and his own observations at the scene.

8. The 2<sup>nd</sup> Defendant testified in his own defence; he did not call any other witness. He adopted his witness statement dated 25<sup>th</sup> May 2012 as his testimony-in-chief. His testimony was that he had come off Mombasa Highway in order to go to a petrol station on the service road and stopped just before joining the service road when the Deceased rammed into the right hand side front bumper and light assembly of his motor vehicle with his motor cycle. He stated further that he had stopped to give way to the Deceased as required by traffic rules, and that the Deceased hit his car while it was stationary. He was issued with a notice of intended prosecution but was never prosecuted. The Deceased was not wearing a helmet. He reported the accident to the police after attending to the Deceased nearly the whole day.

9. The parties filed written submissions, which I have considered, including the cases cited. The main issues to be decided are one, **whether the accident between the Deceased's motor cycle and the 2<sup>nd</sup> Defendant's motor vehicle was caused by the 2<sup>nd</sup> Defendant's negligence or by the Deceased's negligence**; and two, **what damages, if any, are due to the Plaintiffs**.

10. The 2<sup>nd</sup> Defendant conceded that traffic rules required him to give way to traffic on the service road before joining the same. His testimony was that indeed he stopped to give way to the Deceased. PW3's evidence however, was that the point of impact between the 2<sup>nd</sup> Defendant's car and the Deceased's cycle, as observed by him from broken glasses and other debris on the road, was in the middle of the service road. This can only mean that the 2<sup>nd</sup> Defendant stopped too late, when he was already in the middle of the service road in the path of the Deceased. If he had stopped earlier, before entering the service road, the Deceased would in all likelihood have safely passed. There was no evidence that the Deceased was over-speeding or otherwise riding his cycle without due care and attention.

11. I am thus satisfied upon balance, based upon the evidence placed before the court, that the 2<sup>nd</sup> Defendant caused the accident in which the Deceased sustained fatal injuries. However, I believe the 2<sup>nd</sup> Defendant's testimony that the Deceased was not wearing a helmet at the time of the accident. Had he been wearing one, his injuries would most likely have been greatly mitigated. I will in the circumstances assign to him **30% contributory negligence**. **On liability therefore I find for the Plaintiffs at 70%**. I will now consider what damages to award.

### **Under the Law Reform Act**

#### **Pain and Suffering:**

12. The Deceased underwent treatment for 32 days before he finally succumbed. There is no evidence that he was unconscious during this time. He must have suffered a lot of pain in that one month-plus. I

will award KShs 150,000/00 under this head, to be reduced by 30% contributory negligence.

Loss of Expectation of Life:

13. The Deceased was middle-aged when he died. Conventional awards under this head range between KShs 80,000/00 and KShs 150,000/00. I will award KShs 100,000/00, similarly to be reduced by 30%.

Under the Fatal Accident's Act

14. The Deceased's dependants are entitled to compensation for loss of dependency. These dependants are his wife and four children. At the time of death, he was aged 46 years and in good health. PW1 testified that he used to make KShs. 2,000/00 daily from his butchery business. No evidence of this claimed income was tendered. Though I am satisfied on balance that the Deceased was indeed carrying out a butchery business at the time of his death, there is absolutely no evidence upon which I can attempt to assess his income. Such an exercise would therefore be highly speculative. I therefore consider this an appropriate case where to award a lump sum.

It was held in the case of *Mary Khayesi Awalo & An -v- Mwilu Malungu & An [1999] eKLR* -

**“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court's opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”**

15. Ringera, J reasoned as follows in the case of *Mwanzia Ngalali Mutua -v- Kenya Bus Services (Msa) Ltd & Another* (as quoted by Koome, J in *Albert Odawa -v- Gichimu Gichenji*, Nku HCCA No. 15 of 2003 [2007] eKLR) -

**“The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do”.**

More recently the principle was applied in *Oyugi Judith & An -v- Fredrick Odhiambo Ongong & 3 Others [2014] eKLR*.

16. I have taken into account the fact that the dependants' dependency upon the Deceased would have been only to a certain extent (it is usually no more than two-thirds of the available income). I have also borne in mind the age of the Deceased at the time of his death. Doing the best that I can, and balancing this against that, I will award a lump sum of KShs 3,000,000/00 under the Fatal Accidents Act. This award will be reduced by 30% contributory negligence, thus leaving the sum of KShs 2,100,000/00. I will apportion this sum among the Dependants as follows –

(i) MNM (1<sup>st</sup> Plaintiff) KShs...1,100,000/00

(ii) GNM.....200,000/00

(iii) AMM.....200,000/00

(iv) RNM (Minor).....300,000/00

(v) WMM (Minor).....300,000/00

**Total.....KShs 2,100,000/00**

The shares of the two minor children will be invested in interest-earning accounts in the joint names of the 1<sup>st</sup> Plaintiff and the Deputy Registrar of the court, the same to be released to them upon attaining the age of majority.

17. The Plaintiffs have claimed special damages as follows –

(i) Pre-accident value of Deceased’s motor cycle.....KShs 75,000/00

(ii) Hospital, mortuary and other expenses.....125,956/00

As for the pre-accident value of the motor cycle, I am satisfied that the same was strictly proved. I will award KShs 75,000/00. Of the other special damages claimed, KShs 102,671/00 was strictly proved. I will award the same.

17. In summary there will be judgment for the Plaintiffs against the 2<sup>nd</sup> Defendant as follows –

Under the Law Reform Act.....KShs 250,000/00

Under the Fatal Accidents Act.....3,000,000/00

Special damages.....177,671/00

All these awards will be reduced by 30% contributory negligence. The general damages will carry interest at court rates from the date of judgment, and the specials from the date of filing suit. The Plaintiffs will also have costs of the suit, similarly to be reduced by 30% contributory negligence. That will be the judgment of the court.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT MURANG’A THIS 5<sup>TH</sup> DAY OF JUNE 2015**

**H P G WAWERU**

**JUDGE**