



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 91 OF 2014

JAMES GAKINYA KARIENYE

**NANCY MUGURU GAKINYA (suing as the legal Representative of the
estate of DAVID KELVIN GAKINYA (deceased)).....PLAINTIFF**

VERSUS

PERMINUS KARIUKI GITHINJI.....DEFENDANT

JUDGMENT

This suit was initially instituted before the Chief Magistrate's Court at Milimani vide CM CC No. 4766 of 2010 and vide an order of Honourable Justice Ogolla made on 12th March 2012, the said suit was transferred to the High Court at Milimani for hearing and final determination. The said order was issued on 12th April 2012.

The matter was however registered before the Commercial and Admiralty Division and on 7th April 2014 Honourable Ogolla J transferred it to the Civil Division for directions on quantum after recording a consent on liability between the parties as dictated by the parties' advocates.

It therefore follows that this suit is before me solely for purposes of assessing damages as the issue of liability has been settled in the ratio of 80% to 20% in favour of the plaintiff against the defendant.

The facts of this case are that the plaintiffs James Gakinya Karienyne and Nancy Muguru Gakinya are the parents of the deceased David Kelvin Gakinya who died on 4th April 2009 following a road traffic accident which occurred along Langata Road opposite Uhuru Gardens when the deceased, while travelling as a passenger in motor vehicle registration No. KAT 182C was involved in an accident as a result of which the deceased sustained fatal injuries.

The plaintiffs blame the defendant Perminus Kariuki Githinji the owner of the accident motor vehicle for the occurrence of the said fatal accident.

As the issue of liability has already been agreed upon by consent, I shall not delve into the specific acts of negligence attributed to the defendant, his agent, servant and or driver of the accident motor vehicle.

The hearing commenced on 22nd September 2014 with the plaintiff James Gakinya Karienyne testifying on oath that he is a retired clinical officer and father to the deceased David Maina Gakinya,

besides being the administrator of the deceased's estate vide a grant issued to him jointly with the second plaintiff on 14th September 2009 vide HCC Succession Cause No. 1803 of 2009 at Nairobi. He produced the grant of letters of administration intestate as P Exhibit 1 a and receipt for filing of the succession cause as P Exhibit 1b for kshs 1320/-.

The 1st plaintiff also produced copy of birth and death certificates of the deceased as P Exhibit 2 and P Exhibit 3 respectively.

He testified that the deceased who was his son died at the age of 28 years and a bachelor working with media interactive and earning kshs 28,000/- as his basic pay. He also produced the deceased's pay slips for the months of December 2005, January 2007 and April 2006 as P Exhibit 4a, b, c.

The 1st plaintiff recalled that the deceased died as a result of a road accident as 4th April 2009 as per the witness statement recorded and filed in court in accordance with the provisions of Order 11 of the Civil Procedure Rules.

The 1st plaintiff further testified that the deceased used to support his father by paying fees for 2 of his grant children, his daughter's children, as his daughter is very sick and cannot cater for her children.

Further, that the deceased used to purchase or him medicine for his hypertensive situation, food, clothing for him and his wife (the deceased's mother and second plaintiff) and their grandchildren.

The plaintiff also produced exhibits 5a-j to show the expenditure he incurred being mortuary expenses receipts totaling to kshs 109,500. He also incurred funeral announcement expenses.

He prayed for compensation for loss of dependency and loss of their son. In cross examination by Mrs Wangare Muchemi advocate for the defendant, the plaintiff responded that the deceased used to give him about kshs 10,000/- per month and that he expected his son to marry in future and take care of his own family. He also conceded that upon marriage, the deceased would commit part of his earnings to his family life and children.

The plaintiff also called PW2 Mr Peter Kangangi Njeru who testified on oath that he was a businessman residing in Embu, operating a bookshop, stationeries and catering services. That he also handled Nation Media Group Advertisement Agency. He produced his letter of appointment by the Nation Media Group as their agent a P Exhibit 6 and that he was paid by the plaintiff herein to ran an obituary for the deceased as per Exhibit 7, together with notice of appreciation which all cost kshs 49,680/-.

PW2 also testified that the plaintiff hired his 4 tents each at a cost of shs 3,000, 400 chairs at 10/- each totaling shs 4,000 and feeding of 400 mourners at shs 150 per plate totaling shs 60,000/-. He also charged transportation for the chairs tents and food at 4000/- all totaling shs 80,000 and produced the receipt as P exhibit 8.

On cross examination by Miss Wangare Muchemi the plaintiff's witness stated that the receipts he produced were genuine as he issued them personally after receiving the payments indicated.

PW3 Rose Kaguri, the Media Manager of Media Edge Interactive testified that she knew the deceased David Gakinya who used to work with her as the accounts manager at Media Edge Interactive from the year 2005 earning initially kshs 20,000/- per month but because of his aggressiveness and willingness to work he was promoted in 2007 to accounts manager on the Senior Management earning shs 70,000/0 gross salary per month as at the time of his demise. She confirmed that the pay slips produced By PW1 were from her company and also produced P Exhibit 9a and b pay slips for the months of February 2008 and March 2008 showing the deceased's basic pay as shs 70,000/- per month. She also produced P Exhibit 10a and b letters issued to the deceased on 27th September 2007 and 12th December 2008 appreciating the deceased's dedicated service and rewarding him with a 60% of his average year's pay bonus and letter of promotion.

In cross examination, the witness stated that besides his basic salary of shs 70,000/- the deceased also earned commissions less deductions, and that his net pay was kshs 55,132/-.

At the close of the plaintiffs' case, the defence counsel closed the defence case as the defendant did not wish to call any witness.

The parties then agreed to file written submissions to assist the court assess damages payable to the plaintiffs.

The plaintiffs filed written submissions on 5th December 2014 urging the court to award them kshs 140,000/- under the Law Reform Act for loss of expectation of life and shs 20,000/- for pain and suffering, citing the case of **Simeon Kiplimo Murey and 3 Others vs Kenya Bus Service management Ltd & 4 Others (2014) e KLR**.

Under the Fatal Accidents Act, the plaintiff prayed for shs 14,000,000/- using a multiplier of shs 25 years at 70,000/- per month relying on the case of **Board of Governors Kangubiri Girls High School & Another vs Jane Wanjiku Muriithi & Another (2014) e KLR**.

On special damages, the plaintiff prayed for shs 239,180 as per the exhibits produced. In total the plaintiff prayed for judgment for kshs 14,349,180 less 20% contribution all totaling shs 11,479,344, interest and costs of the suit and any other relief the court may deem fit to grant.

In a rejoinder, the defendant submitted that although the plaintiff had listed the deceased's parents, sisters and brothers as dependants, at the hearing, in his oral testimony, he testified that the deceased used to support his nephews and nieces who cannot be considered as dependants as they are not named in the plaint. He urged the court to disregard them.

On income, it was submitted that paragraph 6 of the plaint pleaded the deceased's earnings as shs 56,544 per month at the time of his demise which had to be specifically proved in evidence. However, that the plaintiff had only produced pay slips P Exhibit 4a and 4b, 4c showing kshs 15,278.00 and 33,170 and kshs 29,028 and that the deceased used to support the family with shs 10,000/- per month. He also referred to the evidence of PW3 who produced pay slips for February 2008 showing shs 50,094 and March 2008 for shs 55,132.00 arguing that the plaintiff failed to prove the pleaded income of kshs 54,544 as per the plaint, as there was no pay slip or document showing what the deceased earned immediately before his death. He urged the court to adopt a minimum wage applicable on the deceased's career (accountant) of shs 19,360.50 under the Labour Relations Act No. 12 of 2007 revised in 2012.

On the multiplicand, the defendant submitted that the court should use the ratio of 1/3 as all dependants named were adults and that as it was expected that his support to them would be minimal upon marriage as he would be expected to use the rest of his income to care for his family and personal upkeep.

On the multiplier, the defendant submitted that the retirement age in Kenya was 55 years and that the fact that the deceased worked for a private company guaranteed him no employment and therefore those uncertainties and contingencies of life, reduces the number of active years and proposed a multiplier of 15 years as fair and reasonable. He relied on **HCC 49/11 Nakuru Charles Masoso Barasa & Another vs Chepkoech Rotich** where Wendoh J on 30th May 2014 awarded shs 15,000 for pain and suffering shs 80,000/- loss of expectation of life and adopted a multiplier of 15 years for a 28 years old deceased who left a child. **HCC 1484/1993 Nairobi Lucy M.Njeri vs Fredrick Mbuthia & Another** where Angawa J on 23rd May 2006 awarded shs 5,000/- for pain and suffering, shs 70,000/- for loss of expectation of life and a multiplier of 20 years for a 28 years old deceased and **HCC 4598/92 Nairobi Bonface Ndega vs Honourable Attorney General** where DKS Aganya J on 23rd March 2006 adopted a multiplier of 12 years for a deceased aged 27 years. On special damages the defendant proposed kshs 240,800/-.

The total figures proposed by the defendant are

- a) Pain and suffering shs 10,000
- b) Loss of expectation of life shs 80,000
- c) Specials shs 240,000
- d) Lost years $19,360 \times 15 \times 12 \times \frac{1}{3} = 563,160.00$

Subject to 20% contribution on liability as conceded by consent.

Determination

I have considered the pleadings by the plaintiff, the evidence as adduced in court both oral and documentary, the submissions by both counsels for the parties and the authorities relied on in support of the quantum for general damages.

It is trite law that when a person is bound to prove the existence of any fact it is said that the burden of proof lay on that person. Furthermore, whoever desires any court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See Section 107 of the Evidence Act Cap 81 Laws of Kenya.

In this case, the burden of proving loss and damage therefore lies with the plaintiffs. In **Timsales Ltd vs Stephen Gacie Nakuru CA No. 74 of 2000**, the court held that:

“A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the cause of duty.....”

In **New Leather Manufacturing Factory Ltd vs John Mburi Mbiti (2013) e KLR** Okwengu J as she then was, relying on the case of **Butler vs Butler (1984) KLR 228** where it was stated:

“The assessment of damages is more like an exercise of discretion by the trial judge.”

In **Patel M. Kariuki vs Attorney General (2014) e KLR** the court acknowledged that the assessment of damages is a matter of judicial discretion for the trial court, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions.

In this case, it is not disputed that the deceased died following the fatal accident. However, the plaintiff did not state whether the deceased died instantly or after sometime. In the absence of any evidence that the deceased died long after the accident, I award the plaintiff a sum of kshs 10,000/- for pain and suffering, being a conventional figure for the death that occurred immediately after the accident, under the Law Reform Act.

On loss of expectation of life, I award the plaintiff kshs 80,000 being a conventional figure based on the authority of **Charles Masoso Barasa & Another vs Chepkoech Rotich & Another (2014) e KLR**.

The above awards are capped to a minimum so that the estate of the deceased does not benefit twice from the same death –under the Fatal Accidents Act and the Law Reform Act.

On the claim under the Fatal Accidents Act, I note that the plaintiffs had letter of administration ad litem to represent the estate of the deceased person. They sued in their capacities as father and mother of the deceased. They are therefore de jure dependants under section 4(1) of the Fatal Accidents Act which provide that:

“every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused..”

The deceased was unmarried and had no known issue. On the claim for lost years (loss of dependency), the manner of assessment of damages under the Fatal Accident's Act was set out in **Chunibhai J Patel and Another vs PF Hayes and Others (1957) EA 748, 749** where the Court of Appeal stated that:-

“ The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased ie his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants.”

In this case, the plaintiffs pleaded that the deceased was aged 28 years, enjoyed a good health and lived a happy and vigorous life. He was an accountant in the firm of Media Edge Interactive and his income after payment of taxes was kshs 56,544 per month.

In his sworn evidence the plaintiff produced pay slips but none of them had the exact figure of shs 56,544 as a monthly pay after deductions. The deceased's pay slip for March 2008 showed earning of 70,000/- gross pay and shs 50,094 net pay for that month. The deceased died on 4th April 2009. None of the pay slips produced were proximate to the time of his death although the employer PW3 testified that as at December 2008 as per P exhibit 10(b) the deceased was performing very well and even earned appreciation and a bonus of 6% of his average years salary in December 2008 for exemplary performance.

However, it is my view that in this case, it was the deceased's employer who was best placed to provide information of the deceased, employment and income. It was not disputed that the deceased worked as an accountant Manager in Creative Business for Media Edge Interactive as shown by the letter of appraisal and promotion dated 27th September 2007 and the letter of appreciation dated December 2008. The death certificate also indicated his profession as an accountant and there was no other evidence to counter that fact.

Although the defendant submitted that there was no prove of the deceased's actual earnings, I do not agree, an accountant in actual employment, and whose employer has testified to that effect and fact of employment and earnings cannot be a freelance worker for this court to take the minimum wage provided by Government circulars or Gazette Notices for a cashier, and in the face of previous pay slips showing how much he earned.

On the evidence before me, I would take the deceased's monthly pay to be kshs 70,000 less 12,936 tax = 57064 based on his March 2008 pay slip which was produced in evidence as an exhibit.

It has also been submitted by the defendant that the deceased would retire at age 55 and that there was no guarantee that he would remain in active employment in the private sector. It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables. The duty of this court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire.

In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life.

According to the plaintiff, the deceased gave kshs 10,000 per month towards his medicine and general support to his mother and siblings who included the sick sister's children as he is sickly and depended on the deceased.

Nonetheless, I agree with the defendant's submission and contention that the deceased sister's children were not named as his dependants and so this court indeed shall not take into account that fact. The plaintiff only made a general pleading that the deceased used to pay fees for his sister's children and intended, in due course, to pay for their further education up to University. That cannot be proof of dependency. Paying fees for your sister's children's education was a gratuitous assistance to his sister's children who were not even named in the pleadings as his direct dependants. The plaintiff conceded that the deceased was expected to marry and reduce the support to his dependants.

I would therefore give 1/3 of his earnings to the support of the deceased's direct dependants named and listed in the plaint.

In **Benedita Wanjiku Kimani (supra)** Emukule J awarded a multiplier of 16 years to a deceased aged 44 years at the time of his death. In **Simon Kiplimo Murey & 3 Others v Kenya Bus Service Management Services Ltd & 4 Others (2014) e KLR** where the deceased died aged 28 years working for Kenya Power and Lighting Co. Ltd and earning kshs 40,000/- per month the court awarded a multiplier of 25 years.

Based on the above authorities, submissions and principles, I would award a multiplier of 25 years urged by the plaintiff though far much below the expected retirement age of the deceased, as that is what he sought from this court. Loss of dependency is therefore calculated as follows $57,064 \times 25 \times \frac{1}{3} \times 12 = 5,706,400$

Pain and suffering	10,000
Loss of expectation of life	80,000
Less 20% contribution	<u>(1,159, 280)</u>
Total	4,637,120
Add Specials	<u>239,180</u>
TOTAL	4,876,300

The plaintiff shall also have interest at court rates on general damages from date of judgment until payment in full and interest on special damages from date of filing suit until payment in full.

The plaintiff shall also have costs of the suit.

Dated, signed and delivered in open court this 20th day of July, 2015.

R.E. ABURILI

JUDGE

20.7.2015

Coram R.E. Aburili J

C.A Samuel

Monyangi hold brief for Miss Amani for plaintiff

No appearance for defendant.

Court- Judgment read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

20/7/2015