



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

**CIVIL SUIT NO. 23 OF 2012**

**REGINA KAMANTHE (Suing on behalf of the estate of  
BONIFACE MUINDE NYAMASYO (deceased).....PLAINTIFF**

**VERSUS**

**ESMOND BRADLEY MARTIN.....DEFENDANT**

**JUDGEMENT**

1. In the Plaintiff dated 2<sup>nd</sup> November 2011, the Plaintiff sued the Defendant claiming for interalia, a workman compensation following the fatal injuries Boniface Muuinde Nyamasyo, deceased suffered on 9<sup>th</sup> June 2008 when the decease was attacked by thugs while on duty as a night watchman at the Defendant's home in Karen. The claim is based on an employers' breach of common law contractual duties towards his employee which led to the demise of the employee while in the course of duty. The Defendant averred that the property the deceased guarded was surrounded by a seven foot high electric fence and the security guard company the Defendant had contracted and stationed a patrol car at least 5 metres outside the compound of the Defendants' premises.

2. While this suit was pending hearing, the Defendant applied for the suit to be struck out on the basis that the same was time-barred by virtue of Section 4(2) of the Limitation of Actions Act vide the motion dated 2<sup>nd</sup> November 2011. The motion was heard and dismissed by Justice Onyancha on 13.11.2013. No appeal has been preferred against the ruling by the Defendant. The Deendant has once against asked this court to determine the same issue. With respect, I do not think I have jurisdiction to go back to an issue which has been heard and determined by another judge with current jurisdiction. Consequently I will decline the invitation to do so and proceed to determine the dispute on its merits.

3. When this came up for substantive hearing, the Plaintiff tendered the evidence of one witness i.e. Nyamasyo Wambua (PW1) in support of the case. PW 1 introduced himself as the deceased's father. He told this court that the deceased was employed by the Defendant as a night watchman on a casual basis earning kshs.350/= per night making it kshs.10,500/= per month. On the fateful night the deceased was attacked by gangsters and was fatally injured while in the course of duty. The deceased was hit on the head with a blunt object. It is the evidence of PW1 that at the time of the attack, the Defendant did not provide any helmet, or other protective equipments nor any form of supervision to the deceased. PW 1 also pointed out that the panic button, which was fixed on one of the walls of the building was not properly working since it had a malfunction. The witness further averred that though the compound was secured with a fence, it was not possible for a watchman to detect any invasion owing to the heavy tree cover and loud noise of wild animals. He attributed the death of the deceased to the failure by the Defendant to provide him with a helmet as a protective gear, adequate supervision, training on the job and safe system of work. At the time of his death, the deceased was aged 26 years of age. PW1 said that the

deceased used to do other manual jobs when he was not on duty and that he used to support his parents by giving them Kshs.6000 and further provided Kshs,7,000/= per month to cater for the school fees of his siblings.

4. The defendant too testified without the benefit of an independent witness. He told this court that he provided a and continued to provide, around his premises the following security measures:

- i. A six foot high wire fence
- ii. A seven foot high electric fence with concrete support on the ground
- iii. A 24 hour security back up system with electronic push or panic buttons in and around the premises.

5. Esmond Bradley Martin further told this court that security Group Kenya had stationed a security car about 5 metres away from the edge of his property as a security back up.

6. According to the Defendant the deceased's work was to basically open the gate and provide supplementary services to the security firm he had contracted. The Defendant alleged that the deceased was negligent in that he had failed to press the panic button in time in order to alert the security back up thus letting the thugs gain entry into the premises. The Defendant averred that he cannot shoulder any blame yet he had taken all the necessary and adequate precautions to enhance security and provide a safe working environment for people working in his premises. In cross-examination the Defendant stated that he was never been asked to provide a helmet to the Defendant. He also admitted that he never had the deceased trained for the job but that he personally trained him on how to use the panic button. The Defendant pointed out that the thugs gained entry into his compound by digging a hole under the fence.

7. After a careful consideration of the evidence and the rival submissions, the following issues arose for the determination of this court

- i. Whether or not the Defendant was in breach of contractual duties at common Law?
- ii. Is the Plaintiff entitled to general damages and if so, how much?

8. On the first issue as to whether the Defendant was in breach of the Plaintiff's contractual duty in common law, the common law position is succinctly stated in **Halsbury's Laws of England, 4<sup>th</sup> Edition vol. 16 Para 560** as follows:

***“At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances..... so as not to expose them to an unnecessary risk.”***

9. **In Winfield and Jolowicz on Tort by WVH Rogers, 14<sup>th</sup> Edition, London Sweet & Maxwell at page 213**, it is stated as follows inter alia:

***“If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety device, it is sufficient and in general ,satisfactory to say that the employer has not fulfilled its duty.”***

10. From the evidence tendered the Defendant does not deny that he did not provide the late Boniface Muinde Nyamasyo with a helmet. The Defendant also admits that he did not provide any form of training to the deceased on the work he was undertaking. The Defendant has however shown that he substantially provided a safe working environment. There is no dispute that the thugs who fatally assaulted the deceased gained entry into the compound by digging a hole under the fence.

11. There is no dispute that the deceased suffered fatal injuries on the head. Had he been supplied with a helmet most probably the impact of the blunt injury would have been reduced. I have already pointed out that the Defendant tried his level best to provide a safe working environment and a back up security system to assist the deceased. In the circumstances I do not think it is fair to find the Defendant wholly liable.

12. The deceased was required in case of an attack to press the panic button to alert the other security back ups to respond. From the evidence tendered there appears that there was no evidence showing that the deceased did what he was required to do. Had he pressed the panic button a response would have come by. After carefully balancing the evidence I am convinced the deceased and the Defendant should each shoulder 50% liability.

13. On Quantum, the Plaintiff proposed to be awarded kshs.3,942,000/= representing

Loss of expectation of life	-	300,000/=
Pain and suffering	-	1,500,000/=
Loss of dependency	-	<u>2,142,000/=</u>
		<u>3,942,000/=</u>

14. The Defendant on the other hand proposed payment of kshs.548,000/= whose breakdown is as follows:

Loss of dependency	-	ksh.623,280/-
Pain and suffering	-	ksh.25 000/=
Loss of expectation in life		<u>ksh.100,000/=</u>
		<u>Ksh. 548,000/=</u>

15. I have considered the proposal on quantum by both sides. I have also taken into account awards made in near similar cases.

On pain, suffering and loss of amenities, the authorities cited by both sides appear to be on the extreme. Those cited by the Defendant show that on this head the court made awards between kssh.20,000/- and 30,000/-. The Plaintiff on the other hand has supplied authorities showing that the court awarded between kshs.1,000,000/- and 1,500,000/=. There is no doubt that the deceased died as a result of a blunt blow on his head. He must have suffered great pain before he passed on. I think on this head I will award kssh.500,000/=.

16. On the head, of loss of expectation of life, the Plaintiff suggested kshs.300,000/= while the Defendant proposed a sum of kshs.100,000/= I have considered the past awards and I am convinced that an award of ksh.150,000/= suffices as a reasonable award.

17. On loss of dependency, the Plaintiff suggested a multiplier of 25 years based on ksh.10,500 per month with a dependency ration of  $\frac{1}{2}$ . i.e  $10,500 \times 12 \times \frac{1}{2} \times 34 = 2,142,000/=$

The defendant on the other hand proposed a multiplier of 25 years based on the minimum wage of kshs.5,195/= in the ratio of  $\frac{1}{2}$   $5,195 \times 12 \times \frac{1}{2} \times 20 = 623,280/=$

18. After carefully taking into account the rival proposals, I also find them to be worlds apart.

19. There is no doubt that the deceased was aged 26 years at the time of his death. It is common for persons like the deceased to work upto the age of 60 years. I think the suggestion by the Plaintiff suggesting 25 years as the multiplicand is reasonable.

20. The Defendant admitted that the Deceased was earning ksh.10,500 per month. I am convinced that it

is only reasonable to go as per the known monthly pay than going the minimum wage of kshs.5,195.

21. I am also convinced that the evidence tendered by the deceased's father that his deceased's son used to support them with kshs.6,000/= per month is plausible in view of the fact that there was evidence that the deceased was doing other manual jobs when he was not on duty thus supplementing his income.

The aforesaid sum represents 2/3 of his income.

22. In the end I award the Plaintiff kshs.2,100,000/= on loss of dependency calculated as follows  $25 \times 10,500 \times 12 \times 2/3 = 2,100,000/=$ , 2,100,000

23. In the final analysis judgement is entered in favour of the

Plaintiff and against the Defendant as follows:

a. Loss of dependency	-	ksh.2,100,000/=
b. Pain suffering & Loss of amenities	-	ksh. 500,000/=
c. <u>Loss of expectation of life</u>	-	<u>ksh. 150,000/=</u>
		<u>2,750,000/=</u>
	Less 50% i.e	kshs.1,375,000
	Net total	kshs.1,375,000/=

d. Costs of the suit

Dated and delivered in open court this 9<sup>th</sup> day of October, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant