



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

**HC MISC. NO. 266 OF 2010**

**GRACE WAMBUI.....1<sup>ST</sup> PLAINTIFF**

**ANNE WANJIRU WACHIRA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PASTOR SAMMY KINGOLA KIANGI.....1<sup>ST</sup> DEFENDANT**

**MESHACK MUSAU.....2<sup>ND</sup> DEFENDANT**

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

- 1). The plaintiffs, Grace Wambui and Anne Wanjiku Wachira filed this suit as the personal representatives of Titus Migwi Wachira (Deceased). The 1<sup>st</sup> defendant, Pastor Sammy Kingola Kiangi and the 2<sup>nd</sup> defendant Meshack Musau are sued as the owner and driver respectively of motor vehicle registration No. KAN 373A at the material time.
- 2). The plaintiffs' claim is that on 22-9-2003, the deceased was a passenger in the said motor vehicle when the motor vehicle was driven negligently and lost control and rolled. The deceased sustained severe injuries and died the following day. The plaintiffs claim is for damages, costs and interest.
- 3). The plaintiffs claim was denied vide a statement of defence dated 10-11-2004. The plaintiffs claim is denied in totality.
- 4). During the hearing of the case, the plaintiffs' side called one witness, PW1 Grace Wambui Mungai. PW1 who is the widow of the deceased and the 1<sup>st</sup> plaintiff herein produced a copy of the grant of letters of administration intestate. Her evidence was that at the material time they were travelling from Namanga to Kitengela when the motor vehicle they were traveling in was involved in an accident at Maili Tisa area. The deceased was injured in the accident and died.
- 5). PW1 produced the marriage certificate and stated that the marriage was blessed with one child. That her husband was a graduate teacher and worked with the TSC and earned Kshs. 33,000/= per month. PW1 blames the accident on the high speed and lack of control of the motor vehicle. She produced receipts for the burial expenses.
- 6). The defendants side called three witnesses. That is the driver, DW1 Meshack Musau Kimwele (2<sup>nd</sup> defendant), DW2 Sammy Kingola Kiangi (1<sup>st</sup> Defendant) and DW3 Esther Syunthi Kingola who was a passenger in the motor vehicle in question at the material time. The total sum of their evidence was that a hyena emerged from the bushes and entered the road suddenly. That the driver applied emergency brakes

but the motor vehicle hit the hyena and lost control and went off the road and hit a tree stump and rolled. That the deceased who was injured in the accident passed away while undergoing treatment at Kajiado District Hospital.

- 7). At the close of the case the parties filed written submissions which the court has duly considered.
- 8). There is no dispute that the plaintiffs are the administrators of the estate of the deceased. There is also no dispute that the motor vehicle was owned by the 1<sup>st</sup> defendant and driven by the 2<sup>nd</sup> defendant at the material time. It is also common ground that the accident occurred and the deceased succumbed to the injuries sustained in the accident.
- 9). The bone of contention is the issue of negligence. The undisputed facts from both sides is that the accident occurred at night and that a hyena precipitated the concatenation of the events herein. The point of divergence is whether the accident was inevitable or whether the driver was negligent.
- 10). According to PW1, the driver was negligent in that he was at a high speed and failed to control the motor vehicle.
- 11). DW1 the driver of the motor vehicle gave inconsistent and self contradictory evidence regarding the point at which he saw the hyena. DW1 stated in his evidence in chief that he saw the hyena when it was about three meters away from the front of the motor vehicle. That he tried to avoid the hyena and applied emergency breaks. During cross examination DW1 admitted that he recorded a statement which reflected that he saw the hyena when it was at the road side then the hyena started to cross the road. He however maintained that the correct position was that he saw the hyena when it was already at the middle of the road.
- 12). The evidence of DW2 and DW3 who were the other passengers in the motor vehicle is categorical that they saw the hyena emerge from the bushes then walked into the road. If the position of the driver (DW1) is that he saw the hyena when it was already at the middle of the road, then it would mean that he was not keeping a proper lookout. DW2 and DW3 were passengers yet they saw the hyena before it entered the road. At the speed of 70-80 Kph as per the evidence of the driver and on a straight stretch of the road without any other motorists and with his motor vehicle lights on, the driver was not properly in control of the motor vehicle or failed to tell the court the entire truth.
- 13). The plaintiffs' counsel submitted that the defendants be held 100% liable for the accident. The defendants on the other hand submitted on liability at 50%. With the foregoing analysis of the evidence, I hold that the hyena contributed to the causation of events. However, the driver was negligent in the manner he managed and controlled the motor vehicle. I hold the defendants 70% liable for the accident.
- 14). The death certificate reflects that the deceased died on 23-9-2003 at Maili Tisa area along the Namanga-Nairobi road. According to the evidence of PW1 the deceased died the same day (night). It is clear from the death certificate that the deceased was not attended to at the hospital. The plaintiffs' counsel submitted for an award of Kshs. 100,000/= for pain and suffering while the defendants side submitted for Kshs. 20,000/=. Taking into account that the death was not instantaneous, I award Kshs. 50,000/= on that head. I also award the sum of Kshs. 100,000/= conventional amount for loss of expectation of life.
- 15). On loss of dependency, the deceased was 34 years old. The age of retirement in public service in Kenya is 60 years. The plaintiff's counsel submitted for a multiplier of 26 years while the defendant submitted for 21 years. Taking into account the preponderances of life and that the payment will be in a lump sum, I find a multiplier of 22 years to be reasonable.
- 16). The deceased was employed by TSC as a teacher. His payslip for the month of October 2003 reflects a gross pay of Kshs. 33,898/=. Taking into account the statutory deductions and further considering that the hardship allowance reflected in the payslip is not permanent, I adopt a multiplicand of Kshs. 22,000/=.

17). PW1's evidence is that the family was 100% dependant on the deceased. However, the deceased must have used some of the money for his own upkeep. I will therefore adopt the conventional 2/3 ratio. Dependency therefore works out as follows:

$$\text{Kshs. } 22 \times 12 \times 22 \times \frac{2}{3} = 3,872,000/=$$

In my assessment of the loss of dependency, I have borne in mind the amount awarded under the Law Reform Act so that the estate of the deceased does not benefit twice.

18). The claim for special damages is for Kshs. 85,200/=. The special damages which have been pleaded and proved as per the receipts produced is Kshs. 70,000/= for funeral expenses and Kshs 100/= for obtaining the police abstract. The claim for Kshs. 100/= for obtaining the death certificate and Kshs. 15,000/= for obtaining the grant of letters of administration intestate are not supported by any documents or receipts.

The total award is as follows:

a. Pain and suffering-	<b>Kshs. 30,000/=</b>
b. Loss of expectation of life-	<b>Kshs. 100,000/=</b>
c. Loss of dependency-	<b>Kshs. 3,872,000/=</b>
d. Special damages-	<b><u>Kshs. 70,000/=</u></b>
<b>Total</b>	<b><u>Kshs. 4,072,100/=</u></b>
<b>Less 30% -</b>	<b><u>Kshs. 1,221,630/=</u></b>
<b>Total</b>	<b><u>Kshs. 3,851,470/=</u></b>

Judgment is hereby entered for the plaintiff against the defendants jointly and severally for the sum of Kshs. 3,851,470/= plus costs and interest.

**Dated, signed and delivered at Machakos this 2<sup>nd</sup> day of December, 2015.**

**B. THURANIRA JADEN**

**JUDGE**