



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL CASE 22 OF 2007**

**ESTHER WAMBURA WAMGUGU.....PLAINTIFF**

**VERSUS**

**JOSEPH MWANGI MUHIA.....DEFENDANT**

: Death arising from road traffic accident – Deceased knocked down – died instantly

– whether damages for pain and suffering payable.

: Damages – assessment of damages deceased aged 42 years – loss of dependency

**JUDGEMENT**

The Plaintiff is the wife of the late Simon Gitahi Ngachu who died on 26<sup>th</sup> November 2005 arising from injuries occasioned in a road traffic accident on that date. The motor vehicle KAD 423D, Toyota Corolla which was apparently driven by one Joseph Mwangi Muhia on the material date, although the motor vehicle Registration records kept by the Registrar of Motor Vehicles shows the owner of the vehicle as one Grace Githiomi, the 2<sup>nd</sup> Defendant herein.

The Plaintiff, the widow of the deceased, now brings this suit (Plaint is dated 3<sup>rd</sup> October 2006) and claims damages under the Law Reform Act (Cap 26, Laws of Kenya), and the Fatal Accidents Act (Cap 32 Laws of Kenya), special damages, interest and costs.

Summons to Enter Appearance was served upon the defendants on 26<sup>th</sup> March 2007 in the presence of one Charles Kariuki, learned Counsel for the Plaintiff herein. The Defendants failed either to enter an appearance or to file a defence within the prescribed time. The Plaintiff therefore applied for, and judgment was entered in default for the Plaintiff on 7<sup>th</sup> May 2008. The matter was fixed for formal proof without the participation of either of the defendants.

When the matter came before me on 16<sup>th</sup> March, 2009, I raised the question of why the matter was filed in Meru whereas the cause of action arose in Nairobi, (the accident had occurred along Landhies Road in Nairobi). The explanation I was given by Counsel was that the Plaintiff had since the death of her husband shifted her base of operation to Meru, and found it convenient to have the suit filed and determined in Meru. Mr. Charles Kariuki learned Counsel for Plaintiff, was however in his written submissions, courteous enough to draw my attention to the decision of the court of Appeal on this very

point in the case of **FRANCIS NDICHU GITHOGO VS EVANS KITAZI ONDANGA and COLLINDALE LTD** in Civil Appeal No. 287 of 2002 in which that Court held inter alia that the High Court had territorial jurisdiction throughout the Republic of Kenya and that the limitation on place of jurisdiction provided in sections 11, 12, 13, 14 and indeed 15 of the Civil Procedure Act, (Cap 21, Laws of Kenya) apply to subordinate courts only, and not the High Court.

The Court of Appeal also held that those limitations place of suing do not apply to the High Court, that the High Court, has in exercise of its original and unlimited jurisdiction in civil and criminal matters, the discretion under Order XLVI, rule 5 (2), of its own motion or on the application of any party to a suit and for cause shown to order that a case be tried in a particular place to be appointed by the court.

In this case, in the absence of any defence or application from the Defendants, there was no cause to order the transfer of the matter to any other court for hearing and determination. The matter therefore proceeded before me by way of formal proof.

The only evidence given was that of the Plaintiff. The evidence was that the accident occurred along Jogoo Road. This is contrary to the Police Abstract Report dated 22.02.2005, and also the Death Certificate No.99624, (Entry No.260521534) which both shows that the accident occurred along Landhies Road. The Plaintiff also testified that her Advocates sent notice to Standard Assurance Co. Ltd the insurers of Motor Vehicle No. KAP 423, The said Counsel also wrote to the said insurers per letter dated 4<sup>th</sup> February 2008 asking the insurers whether they would take over the matter as their insured had failed to either enter an appearance or file a defence. There is also a curious letter dated 22.02.2005 addressed to the Claims Manager Standard Insurance Co. Ltd and stamped by that Company as having been received on 23.02.2006 a year after it was written. (It is copied to the 1<sup>st</sup> Defendant, of P.O. Box 7644 but no City or Town or physical address is indicated)

If the accident occurred on 26<sup>th</sup> November 2005, as indicated in the Certificate of Death, why would a Notice be dated 22.02.2005 more than nine months (9) months before the accident? Why would it be sent more than a year later? The abstract from Police on a Road Accident is signed by the D.T.O. Central and is dated 22.02.2005 and relates to an accident which occurred nine months later 26.11.2005! The official receipt for the Abstract is dated 18.01.2006 and is issued by Superintendent of Police Nairobi Railway Division. Is he the same as D.T.O Central? These are rather strange coincidences to ignore.

Although a civil case is to be proved on the balance of probability, where liability is to be found against a defendant particularly in an undefended suit, the evidence of probability of the event is required to be cogent and consistent. So a balance of probability means, the preponderance of the evidence, that is the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

In this case about the only probable thing is that some one called Simon Gitahi Ngacu died on 26.11.2005. The other probable evidence is that there was a motor vehicle KAP 423D Toyota Corolla, the record from the Registrar of Motor Vehicles shows so, and that the Second Defendant was the owner thereof. That vehicle was involved in a fatal accident on 26.11.2005 (not 22.02.2005), in which Simon Gitahi Ngacu died. The deceased's rural home was Mukurweini Nyeri. A letter from Senior Chief Mukurweini Githondu Location dated 14<sup>th</sup> March 2006 says so. The deceased's customary law wife was the Plaintiff.

The deceased, was, according to the evidence of the plaintiff (who was the only witness, a hand-cart (mukokoteni) operator. She testified that he used to earn shs.1000/= per day and used to work for 30 days every month thus earning shs.30,000/= per month and used to give his wife Kshs.200/= per day or Kshs.6000 per month. When he died he left the Plaintiff his widow, and three daughters – Lucy Wanjiru (now in Form II), Anne Wangui who was in pre-Unit was now in Class IV, and one Catherine Njoki who was in nursery at the time of his death.

Mr. Charles Kariuki, learned Counsel for the Plaintiff suggested a multiplier of 20 years on the premise that the deceased would have worked until the age of 60, so that the damages for **loss of dependency** would amount to  $Kshs.1000 \times 30 \text{ days} \times 12 \times 20 \times 2 = 4,800/=$  loss of expectation of life  $Kshs.100,000/=$  for pain and suffering, and that as the deceased died in hospital –  $Kshs.20,000/=$  for special damages and funeral expenses  $Kshs.20,000/=$  all earning the Plaintiff  $Kshs.4,940,000/=$ .

There was no evidence that the deceased used to earn  $shs.1000/=$  per day, or that he used to work for 30 days a month. I am highly doubtful that the deceased used to work 30 days a month. Kenyans are a very religious people and most spare a day of rest, I doubt that the deceased was an exception. I would also doubt he used to earn  $30,000/=$  per month. If he earned that kind of income with no taxes, he would at age 42, have graduated from a hand-cart operator to a taxi-operator, or even a matatu operator. His income at  $shs.30,000/=$  is exaggerated. A more modest income would be about  $Kshs.6000/=$  per month.

The deceased was 42 years of age, and a multiplier of 13 years (to age 55 years) would be more reasonable. Damages for loss of dependency under the Fatal Accidents Act, would therefore comprise a putative monthly income of  $Kshs.6,000/=$  multiplied by twelve months for a year's salary and by the years of lost earnings less  $1/3$  spent on self. The computation would thus be –  $shs.6000 \times 12 \times 13 \times 2/3 = 576,000/=$

As to special damages, the Plaintiff told the Court that she spent  $Shs.20,000/=$  for funeral expenses. There were two receipts. Special damages must be specifically pleaded and proved. There is however every indication that the deceased's body was taken to and was buried at his rural home. That must have cost some money. Using the Court's discretion, I would assess those costs at  $shs.20,000/=$ . In view of the inconsistencies as to dates and place of issue of the Abstract from Police Record on a Road Accident, (it is dated 22.02.2005 (9 months before the accident) which is stated to have occurred on 26.11.2005, I decline to give the costs for the Abstract. I would grant the costs of the Certificate of Death of  $Kshs.150/=$ .

As for pain and suffering under the Law Reforms Act, there was a suggestion that the deceased was knocked down by the Defendant's vehicle and was rushed to Hospital where he died. I would award a sum of  $Kshs.10,000/=$ .

The currently accepted conventional sum for loss of life is  $100,000/=$ .

### Conclusion

The grand total of general and special damages would be an addition of the total for lost earnings (loss of dependency) less the sum of for pain and suffering as the deceased died shortly after the accident, as the conventional sum for loss of life expectation –

(1) Loss of dependency – - shs.576,000/=

(2) Less (a) Pain & Suffering -shs.10,000/=

(b) Expectation of life - 100,000/=

Net due - 110,000/=      110,000

466,000

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There shall therefore be judgment for the Plaintiff in the Sum of  $Kshs.486,000/=$  made as follows:-

(1) General and damages : 466,000/=

(2) Funeral Expenses : 20,000/=

486,000/=

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The Plaintiff will also have the costs of this suit.

Dated delivered and signed at Meru this 8<sup>th</sup> day May 2009.

**M. J. ANYARA EMUKULE**

**(JUDGE)**