



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 1225 OF 93**

**REHMA ADHIAMBO MARJAN ..... PLAINTIFF**

**VERSUS**

**FANUEL OBWARO & ANOTHER ..... DEFENDANT**

**JUDGMENT**

The case before me is a motor accident collusion case. As a result of an accident that occurred on the 12.9.90 along the Kisumu - Nairobi road at about 9.00 p.m., the deceased died whilst driving motor vehicle KAA 733C.

His widow filed this case on the 15.3.93 on behalf of his estate and sued the two defendants as driver and owner of the said vehicle respectively. She claimed General Damages under the Fatal Accidents act (Cap.32) and the law Reform act Cap.26, Special Damages interest and costs.

When the case first came up for hearing on the 12th of November, 1998 The Hon. J. Mitey J heard the evidence of the plaintiff. Her advocate chose to adjourn the case on the grounds that the letters of Administration held by the Plaintiff were obtained after the suit had been filed.

When the case came up for hearing again, this time before me, the advocate for the plaintiff abandoned the claim under the Law Reform Act. He proceeded to present the case under the Fatal Accidents Act. I proceeded with the trial basically afresh but Order 17 r 10 CPR permits me to take over a case where the trial judge is not available. In this instance Hon. Justice Mitey was currently not in the Nairobi Station.

The plaintiff was the only witness who was called to give evidence. She informed the court how she heard her husband had been involved in a motor vehicle accident. She rushed to hospital where she then moved him to another hospital for treatment unfortunately he died.

It is then through her evidence that it transpired that the couple had run a business of operating a matatu vehicle. She had taken a loan to buy the vehicle (although no evidence to this effect was produced). She had opened a bank account. Payments were made into the said Bank Account from the proceeds of the daily collections. She produced a bank statement which she claimed proved that an amount of Ksh.35,000/- to 40,000/- was being collected per month.

She also stated that this amount was so given after all the deduction had been made for repairs, the

drivers salary and then the persons whom she would take the loan from would get their share of the proceeds. This was about Kshs.62,000/- per month.

The plaintiff named her children - five in total now aged 18,16,14,12 and 10 years respectively. All 4 daughters except the last born a son. She indicated that they were all dependants of the deceased.

The advocate for the plaintiff suprisingly in his submissions claimed that the plaintiff had proved she had shown that there was an accident that occurred. That this accident was as a result of the defendants negligence. He further stated that this evidence came from the police abstract report that had been put in by consent. The abstract report stated that the defendant was charged with a Traffic offence of causing death by dangerous driving. He was convicted and sentenced to 3 years imprisonment. He asked this court to hold the defendants 100% liable for the accident.

In reply to this point, the advocate for the defendant stated that there was the police abstract report indicating the accident. He left it to the court to decide whether this was conclusive evidence.

On the point of liability, the plaintiff was not an eye witness. She was not present to the scene when the accident occurred. She was therefore not able to tell this court what actually occurred and who was liable.

In the defendants defence, they admitted that an accident occurred but that this was wholly contributed by the plaintiffs negligence whilst driving the motor vehicle KAA 733 C.

I have held in the past that a witness cannot come to court and state there was an accident. The plaintiff is bound to prove her case beyond a balance of probability.

I find her evidence alone is not sufficient to prove negligence.

What the plaintiffs advocate should have done is procure the proceedings of the lower court and present the said proceedings under Section 34 of the Evidence Act. This would thus enable the [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) 5 court to read the circumstances of the said case in such a way as determine the liability of the parties.

The presentation of the Police abstract only states a fact that there was a person who was fined and sentenced to jail for a traffic offence. I require to have a certified proceedings of the original case and not only the abstract form alone.

I do know that my brother judge, Hon. Justice Juma J. in the case of

Esther Mujuli Matheka

v

Meraria Nduta

Nairobi Hccc 3030/91 unreported.

Made a finding on a police abstract report only with no other evidence. This was on the grounds that the report indicated that he defendants were charged with causing death by dangerous driving. I had ruled in my judgement in the case of

Samuel Njama Gachini

v

Josphat Kingori

that I did not agree with this. The reasons being that in order to prove liability and negligence against a party, there must be more proof than a statement in the abstract report.

I therefore hold that liability against the defendant has not been preserved. I hereby dismiss this case.

I am required to state what I would have awarded on the question of damages.

The advocate for the plaintiff stated that under the Fatal Accident Act he was praying for Kshs.5 million when asked how he came to this figure he stated that he took a summary figure of Kshs.35,000/- being the deceased income. He then urged this court to take a multiplier of 20 years. This is because the deceased was 30 years and would have retired at the age of 50 years.

He thus took the average figure from 35,000/- x 20 x 12.

He prayed that 2/3rds of this figure should go to the upkeep of the family.

He relied on the defendants authorities to support his case.

On the Special damages he prayed Ksh.57,000/- spend on the hospital medication to be allowed.

In reply the advocate for the defendant stated, from the statement of the bank a reasonable income from the business would be Kshs.5,000/- to Kshs.10,000/- per month. It seems that a multiplier of 15 years would be reasonable 1/3 of this figure would be used instead.

This 5,000/- x 15 years x 12 x 1/3 = Kshs.300,000/-. Or Kshs.600,000/- on the income of 10,000/-. As to the Special Damages, this ought to be specifically pleaded.

I would in this instance find that an average income of Kshs.10,000/- would have been sufficient and more realistic in this instant as to indicate the amount that the deceased may have been earning. I would thus have awarded General Damages under loss of dependency of Kshs.600,000/-.

I note the plaintiff did not claim for the damage to the vehicle which was a right off.

As to special Damages, the only claim made by the plaintiff is that of funeral expenses. There was no claim pleaded for hospital bills.

The funeral expenses was pleaded to amount to Ksh.57,548/-. I believe the plaintiff is bound by his pleadings. I would disallow this claim.

The case is otherwise dismissed with costs to the defendants.

Dated this 27th day of April, 1999 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**