



**1. REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Case 380 & 243 of 1998**

**JOSEPH SURI NYATENG' .....1<sup>st</sup>**  
**PLAINTIFF**

**2. JENIPHER GUMBA OYOO.....2<sup>ND</sup>**  
**PLAINTIFF**

**VERSUS**

**H.P. MASHRU LIMITED.....**  
**.....DEFENDANT**

**JUDGMENT**

**JOSEPH SURI NYATENG'** (1<sup>st</sup> Plaintiff) was the husband of one **WILFREDA ACHIENG'** (Deceased) and the legal representative of her estate. He brought suit (KISII HCCC.NO.380 of 1997) by amended plaint dated 6<sup>th</sup> August 1998 (the original plaint was dated 3<sup>rd</sup> September and filed on the same date) on his own behalf and for the benefit of the estate of the Deceased. The suit was also brought on behalf of these other dependants of the deceased:

- (i) SELA AUMA-then aged 18 years
- (ii) BEATRICE AKINYI- then aged 17 years
- (iii) DOROTHY ATIENO- then aged 14 years
- (iv) MAURICE ODHIAMBO- then aged 13 years
- (v) EUNICE ADHIAMBO- then aged 11 years
- (vi) SULEMAN OKINYI- then aged 4 years

The 1<sup>st</sup> Plaintiff claimed the following relief: -

- (a) Special damages of shs. 46, 650

- (b) General damages under the Law Reform Act and the Fatal Accidents Act.
- (c) Costs of the suit
- (d) Interest on (a), (b) and (c)

JENIPHER GUMBA OYOO (2<sup>nd</sup> Plaintiff) brought suit (Kisii HCCC.NO.243 of 1998) by plaint dated and filed on 31<sup>st</sup> July 1998 and claimed the following reliefs: -

- (a) Special damages of shs. 5, 100/-
- (b) General damages
- (c) Costs of the suit
- (d) Interest on (a), (b) and (c) at court rates

On 17<sup>th</sup> February 1999 both these suits were consolidated and subsequently heard as one. No agreed statement of issues was filed in respect of either suit, and no issues were framed before the hearing commenced. From the pleadings I would frame the issues as follows: -

HCCC.NO.380 OF 1997

- (i) Did the accident involving motor vehicle regn. No. KSH 130 occur as a result of the negligence of its driver.
- (ii) Was the Deceased a lawful passenger in the said motor vehicle, and is the Defendant vicariously liable in damages for her death?
- (iii) Are the person named in paragraph 5 of the amended plaint the Deceased's dependants for purposes of the Fatal Accidents Act? If so are they entitled to damages? And if so, what is the quantum thereof?
- (iv) Is the 1<sup>st</sup> plaintiff entitled to damages for loss of consortium and survitium? If so, what is the quantum thereof?
- (v) Is the estate of the Deceased entitled to special damages? If so what is the quantum thereof?
- (vi) Is the estate of the Deceased entitled to general damages under the Law Reform Act? If so what, is the quantum thereof?

HCCC.NO.243 OF 1998

- (i) Did the accident involving motor vehicle KSH 130 occur as a result of the negligence of its driver?
- (ii) Was the 2<sup>nd</sup> plaintiff a lawful passenger in the said motor vehicle at the time of the accident, and is the defendant vicariously liable to the 2<sup>nd</sup> plaintiff in damages for her injuries received in the said

accident?

(iii) What were the injuries suffered by the 2<sup>nd</sup> plaintiff?

(iv) If the 2<sup>nd</sup> plaintiff is entitled to damages, what damages are these and what is the quantum thereof?

There is no dispute that on 30<sup>th</sup> November 1996 the Defendant was the owner of motor vehicle Regn. No. KSH 130, and that the same was being driven by its servant along the Kericho/Kisumu Road in the course of his duties. There is also no dispute that at a place called Kaitui along the said road the motor vehicle violently overturned.

I have carefully considered the evidence on record. In the case of  MBAKA NGURU AND ANOTHER – VS-JAMES GEORGE RAKWAR. Court of Appeal at Nairobi, Civil Appeal No. 133 of 1998 (Unreported) the court said as follows: -

It is trite that when a vehicle overturns it is for the driver to explain the reason for such overturning and in the absence of a reasonable explanation, connoting no negligence, the negligence of the driver is presumed.

The Defendant did not call the driver to offer an explanation as to why the motor vehicle overturned. The 2<sup>nd</sup> Plaintiff (PW1) said in her evidence that just before the accident the motor vehicle was traveling “very fast”. Without any explanation by the driver as to why the motor vehicle overturned I must presume that it so overturned due to the negligence of its driver in the manner that he drove the motor vehicle. I am therefore satisfied on a balance of probabilities that the accident involving motor vehicle Regn.No. KSH 130 on 30<sup>th</sup> November 1996 occurred due to the negligence of its driver.

I am also satisfied on a balance of probabilities that the Deceased and the 2<sup>nd</sup> Plaintiff were fare-paying passengers in the said motor vehicle when the accident occurred. The driver (who was the Defendant’s servant) may not have been authorized to carry passengers (we do not know if this was so as no evidence was led in this regard). But how could the Deceased and the 2<sup>nd</sup> Plaintiff have known this? There is no evidence that the motor vehicle carried any notice or warning that the driver was not authorized to carry passengers. This was the second occasion that the Deceased and the 2<sup>nd</sup> Plaintiff were passengers in that motor vehicle.

The Court of Appeal had this to say in the case of  GEOFFREY CHEGE MUTHU –VS-M/S ANVERALI & BROTHERS Court of Appeal at Nakuru, Civil Appeal No. 68 of 1997 (Unreported): -

The law is, so long as the driver’s act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently or criminally or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable (Per Newbold, P. in MUWONGE-VS-AG of Uganda (1967) EA 17 at page 18.

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I am satisfied that the Deceased was a businesswoman buying and selling maize and other produce at the time of her death. She kept no records of her business transactions, but given the nature of her business, and the fact that she was probably of little, if any, education, it would be unreasonable to expect her to have kept such records. It is therefore difficult to assess what her income was, and in this regard I must take the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs evidence with circumspection. Having considered all evidence in this regard that has been placed before me I am satisfied on balance that the Deceased’s net monthly income was shs. 4, 500/- at the time of her death, and that out of this sum she contributed two-thirds thereof (shs. 3, 000/-)

per month to the family kitty. She spent the remaining shs. 1, 500/- on her self. From her death certificate produced in evidence (Exh. P4) she was aged 35 years at the time of her death. She would probably have traded up to the age of about 50 to 60 years. But given the nature of her business and the vagaries of life (including the appalling frequency of accidents on our roads) I will award a multiplier of 15 years.

The special damages as pleaded were not proved except for shs.100/- for the police abstract (Exh. P6) and shs.50/- for the death certificate (Exh.p4) whose receipts are on the documents themselves. But as regards funeral expenses, it is unreasonable to expect the bereaved family to have kept receipts connected with funeral expenses in their time of grief. I see nothing wrong in awarding a conventional sum as general damages under section 6 of the Fatal Accidents Act.

Doing the best I can, and having considered everything that I should consider, the arithmetic will work out as follows: -

(a) Under the Law Reform Act: -

- (i) Pain and Suffering.....shs. 10,000/-
- (ii) Loss of Expectation of Life.....shs,100, 000/-

Shs. 110,000/-

(b) Under the Fatal Accidents Act: -

- (i) 1<sup>st</sup> Plaintiff's Loss of Consortium and Survitium.....shs. 80,000/-
- (ii) Loss of Dependency shs. 4,500 \* 2/3 \* 12 \* 15.....shs. 540,000/-
- (iii) Funeral Expenses.....shs. 30,000/-

(c) Special Damages .....shs. 150/-

Total.....shs. 760, 150

I will thus enter judgment for the 1<sup>st</sup> Plaintiff in the total sum of shs.760, 150/- as set out above, plus costs. There will be interest at court rates on general damages from the date of judgment and on the costs and special damages from the date of filing suit.

I shall, under section 4(1) of the Fatal Accidents Act, apportion amongst the 1<sup>st</sup> Plaintiff and the six (6) persons named in paragraph 5 of the amended plaint the loss of dependency of shs. 540,000/- as follows: -

|                                |                 |
|--------------------------------|-----------------|
| 1 <sup>st</sup> Plaintiff..... | shs. 210,000/-  |
| Sela Auma .....                | 50,000/-        |
| Beatrice Akinyi.....           | 50,000/-        |
| Dorothy Atieno.....            | 50,000/-        |
| Maurice Odhiambo.....          | 60,000/-        |
| Eunice Adhiambo.....           | 60,000/-        |
| Suleiman Okinyi.....           | <u>60,000/-</u> |

The share of any dependant that shall not have attained the age of 18 years when the loss of dependency is paid shall be invested in an interest-earning account in any acceptable bank or financial institution in the joint names of the Deputy Registrar of this court and the 1<sup>st</sup> Plaintiff, until such dependant attains majority when his or her share shall be paid over to him or her. In the meantime the accruing interest shall be paid over to him or her. In the meantime the accruing interest shall be paid to the 1<sup>st</sup> Plaintiff for the upkeep of such minor.

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The 2<sup>nd</sup> Plaintiff suffered the following injuries according to the medical report (Exh.P2):-

- (i) Dislocation of left shoulder
- (ii) Fracture of mid-shaft left femur
- (iii) Deep cut wound of left leg
- (iv) Severe pains in central chest
- (v) Concussion to the head leading to loss of consciousness for about 15 hours.

She was treated as an in-patient at Kericho District Hospital (2 days) and at the New Nyanza Provincial General Hospital (5 months). Her fracture has not united properly and she still has to use crutches. When she gave evidence she was in crutches and appeared in considerable pain. According to PW2 her fracture was not managed properly because of lack of some facilities in the government hospitals where she was treated. The aftermath of her injuries according to PW2 are:-

- (i) Fracture still in the process of healing and has united badly, resulting in “massive” shortening of the leg. The doctor (PW2) does not say by how much in terms of inches or centimeters. There is also angulation at the fracture site and wastage of muscle.
- (ii) To correct the deformity corrective osteotomy and internal fixation will be needed. This will cost about shs. 150,000/- if done in hospitals in this region. But if done at Kenyatta National Hospital it may cost shs. 300,000/-. But nothing turns on this as there is no claim for future medical treatment in the plaint. The Court of Appeal had this to say in the case of MBAKA NDIRANGU & ANOTHER (supra) when discussing “future medical expenses” :-

There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report for costs of future medication does not help the plaintiff. Simply putting in a prayer for such claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head...

- (iii) Ugly scar in the left leg.
- (iv) Pain at the fracture site.
- (v) Recurrent headaches.
- (vi) Recurrent pain in the chest.
- (vii) Possibility of secondary arthritis in the left shoulder joint.

(viii) Possibility of epilepsy or early dementia because of concussion to the head.

The 2<sup>nd</sup> Plaintiff says that at the time of the accident she was a businesswoman trading in maize and other foodstuffs, just like the Deceased. Her business was smaller than that of the Deceased, and she had been in the business for a shorter period than the Deceased. She has not been able to carry on the business after the accident. I accept all the above facts on a balance of probabilities. From the evidence I am satisfied that the 2<sup>nd</sup> Plaintiff's nett monthly income was shs.3,000/-. It appears that she may not be able to resume her business any time soon, at any rate not until she has had the corrective surgery, which she can now not afford. I agree with her counsel that she will lose income, for purposes of assessing damages, for five (5) years from the date of the accident pending corrective surgery and resumption of business. But there is no claim in the plaint for loss of future earnings. This is a special damage claim that should have been specifically pleaded.

See the case of MBAKA NGURU & ANOTHER (supra). But I think that I should be able to award damages under the head "loss of earning capacity" which are general damages (see same case). The 2<sup>nd</sup> Plaintiff was 51 years old at the time of the accident.

Having considered everything, and doing the best I can, I will award to the 2<sup>nd</sup> Plaintiff damages as follows:-

- (i) Pain, suffering and loss of Amenities.....shs. 450,000/-
- (ii) Loss of Earning Capacity shs. 3000 \* 12 \* 5..... shs 180,000/-
- (iii) Special damages proved.....shs. 2, 500/-

TOTAL .....shs. 632,500/-

I will therefore enter judgment for the 2<sup>nd</sup> Plaintiff in the total sum of shs. 632,500/- as set out above plus costs. There will be interest at court rates on the general damages from the date of judgment and on the special damages and costs from the date of filing suit. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF NOVEMBER 1999

H.P.G. WAWERU

JUDGE.