



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 929 OF 1983**

**BETWEEN**

**ELIZABETH GACOKI W/O KIHARA .....PLAINTIFF**

**AND**

**1. PAUL EKULAN)**

**2. THE ATTORNEY GENERAL).....DEFENDANT**

**JUDGEMENT**

The Plaintiff, ELIZABETH GACOKI w/o KIHARA, brought action on her own behalf, and that of the deceased's estate and his minor dependants claiming damages against PAUL EKULAN (Ist defendant) and the ATTORNEY GENERAL of the Republic of Kenya. The action is based on negligence in an accident which occurred on 13th March 1982, along the Meru-Maua road in which a police motor vehicle, G.K. B547, a Peugeot 504, station wagon which was being driven by the Ist defendant, collided with a pedestrian, MUNYAMBA KIHARA (the plaintiff's husband), causing his instant death. The claim is apparently brought under the Fatal Accidents Act Cap 32 Laws of Kenya.

MUNYAMBU KIHARA (the deceased), was on the material date at about 6.45 a.m walking to his place of work at Meru, where he worked as an office Messenger with the Survey of Kenya, in the company of one SOLOMON MWIREBUA, when the accident happened. The deceased and MWIREBUA, were walking on the left side of the road, off the road, when they saw the said car coming in the opposite direction being driven at high speed. For some unknown reason to them the car left the road, swerved towards them, knocked the deceased down before it climbed the road bank and overturned about 100 feet from the point of impact. The Ist defendant was subsequently prosecuted, convicted and fined Kshs.2000/= under Meru Resident Magistrate's Court Traffic Case No.4458 of 1982. This is however denied by the both defendants in their joint statement of defence dated 18th May 1983, and filed on the same date. It was the Plaintiff's case that the Ist defendant, as servant or agent of the Government of the Republic of Kenya which then owned the said motor vehicle, drove, managed and controlled the said vehicle so negligently that he permitted it to collide with the deceased, who was then lawfully walking along the Meru-Maua road, causing his instant death and, consequently he is liable to damages to the plaintiff, the deceased's minor dependants, and his estate. Also, the government in a vicarious capacity.

The written statement of defence while admitting that the Ist defendant was at the material time a servant or agent of the government of Kenya, represented by the Attorney General in this suit, and, that the accident did happen as averred in the plaint, denied each and all allegations pertaining to negligence, liability and damages. However, neither defendant was present during the hearing of this case to resist the

claim herein inspite of the fact that they were duly served with a hearing notice on 17th November 1986. The hearing of the suit proceeded ex parte.

The Plaintiff's advocates on record, Messrs Kangwana & Co, advocates framed the issues for the approval of the Attorney General's office, but it would appear that although the same had been passed on to that office for approval there was neglect or oversight in doing so. I propose to use those issues, which I am going to set out shortly, as the basis for this judgment. Those issues are:-

***(1) Was the Ist defendant guilty of negligence in driving managing and controlling motor vehicle Reg. No. GK. B547?***

***2) Was the deceased guilty of any contributory negligence?***

***3) What, (if any) is the quantum of damages, payable to the plaintiff?***

It was pleaded in paragraph 9 of the plaint, it was also counsel's submission, that the Ist defendant was convicted and fined for causing the death of the deceased. This as indicated earlier was denied by the defendants in their joint written statement of defence. SOLOMON MWIREBUA, who was with the deceased at the time of the fatal accident was a witness for the prosecution in that case. He testified before me that the Ist defendant was convicted and fined as alleged. He was not contradicted on that the both defendants having not appeared to defend the suit against them. I have no basis for either disbelieving him or finding otherwise. I accept his testimony as being true. By reason of the Provisions of S.47A of the Evidence Act, Cap 80 Laws of Kenya, that is conclusive proof of negligence on the part of the Ist defendant, thus making him liable in damages to the deceased's widow, the plaintiff in this case, any minor defendants and, his estate.

The liability of the second defendant is vicarious. The next issue is whether the liability of the both defendants is total or partial. There is no evidence to indicate that the deceased was blameworthy in the accident which caused his death. SOLOMON MWIREBUA testified that the accident car left the road and collided with the deceased off the road. I have no basis for finding to the contrary. Accordingly I find and hold that the deceased did not contribute to his death by any negligent act or omission on his part.

I now turn to the vexing question which concerns the quantum of damages. The dependency of the plaintiff on the deceased is quite plain and obvious. Not so, however, for ANNE WANJIRU KIHARA, WANJIKU KIHARA, JOHN MBUGUA KIHARA and GRACE WANGUI KIHARA; who were particularized in paragraph 5 of the plaint as the other dependants of the deceased. I say so because neither the plaint nor the evidence of the plaintiff does indicate with any particularity or at all their relationship with the deceased or their respective ages so as to show that they were or still are dependent on the deceased or his estate. Section 8 of the Fatal Accidents Act, Cap 32 Laws of Kenya, does require that the full particulars of the deceased's dependants be set out in the claim, presumably to give some indication as to the extent of their dependency and the duration of the dependency. The plaintiff was under a duty not only to supply those particulars but also to prove by evidence on a balance of probabilities the extent of their dependency on the deceased and, also, the duration of that dependency. She did neither of those. I am, therefore, not inclined to find that the persons named in paragraph 5 of the plaint were dependants of the deceased.

The deceased, who was working as an office messenger at the time of his death at a monthly gross salary of Kshs.1085 inclusive of house allowance was not shown to have had any other source of income. As at the end of March 1982, his net earning was Kshs.747 which came about after statutory deductions and other deductions made to meet monthly contributions he was making towards co-operative shares and co-operative loan and interest payments. There was no evidence adduced with regard to the manner in which the nett salary was being apportioned between the deceased and his dependants. Mr Onyancha Bw'Omote, learned Counsel for the Plaintiff, urged the view that the plaintiff - having been and still being the sole widow of the deceased and because the plaintiff testified that she was wholly and solely dependent on the deceased, I should find and hold that the dependency's entitlement would be two thirds of the deceased's income. He did not indicate upon what basis he arrived at that estimate.

He was silent concerning the other named dependants, properly so in my view, because no evidence was adduced touching on them. In absence of evidence for determining what fraction of the deceased's income was applied for the plaintiff, I will do my best to get a reasonable estimate. The deceased lived and worked at Meru. From the averment in paragraph 1 of the plaint it would appear he lived there with his wife. Much of his monthly nett income must have been spent in his house to maintain himself and his family.

I reckon that only a small fraction of the total income was spent by the deceased for his own personal benefit. Mr Onyancha estimated that one third of that income was applied to that end, leaving he balance for the benefit of the dependants. He did not indicate how he came to that estimate, but it would appear he allowed the minor dependants about one third of the income together with the remaining third to the plaintiff. I will accept that as a proper and reasonable basis for working out the loss suffered by the plaintiff and the minor dependants of the deceased, if any. I have already held that there is no basis for treating the persons named in paragraph 5 of the plaint as dependants in absence of their full particulars. The total dependency benefit must therefore be scaled down by about half of the total dependency benefit.

That will then leave about one third, (for the plaintiff), of the deceased's income, thus giving a monthly dependency of Kshs345 or Kshs.4140 per annum for her. I find that to be the multiplicand.

Mr Onyancha invited me to award damages based on a multiplier of 8. He relied on the decision in SIMBA CLOTHING FACTORY LTD & ANOTHER V. BAKSHISH KAUR VIRDEE, Civil Appeal No.28 of 1976 (C.A) in which a multiplier of 8 was applied. The deceased in that case was 50 years old at the time of his death. The deceased in the present case died when he was 53 years old. There is no evidence he had ill health or that he was either undernourished or was having any physical or other disability which would have affected his earning life. I accept 8 as a reasonable multiplier. Although there is a difference of three years between the deceased's ages in the case cited and in this case, each case has to be looked at on its own peculiar facts. In the present case the plaintiff was wholly and solely dependent on the deceased and the dependency was expected to continue even after the retirement of the deceased. Applying that multiplier the total pecuniary loss the plaintiff would be entitled is kshs.33,120, which I accordingly grant to her as general damages.

As for the loss to the estate of the deceased there was no evidence adduced on it to entitle me to work out and assign any mathematical figure as loss to it.

As for special damages evidence was led with regard to funeral expenses, but none was adduced on the police report. I will grant the prayer on special damages to extent of Kshs.3500/= being funeral expenses.

I was invited to award punitive damages against the both defendant for flagrantly delaying the settlement of the plaintiff's claim and for showing total disregard of the rights of the deceased's dependants to quick relief. With all due respect to learned Counsel, there was no plea for general damages made in the plaint. Furthermore a claim for punitive damages, to my mind, arises from an act or omission of a flagrant nature against the rights of the claimant, arising from circumstances upon which the claim for damages is based. The basis for urging an award of punitive damages is conduct disclosed after the pleadings in this suit had closed and which in any event will be compensated by an award of costs and interest. In those circumstances I am not persuaded that such a plea was right in the circumstances of this case.

The upshot of the foregoing is that there will be judgment for the plaintiff for Kshs.3500/= special damages, and, Kshs.33,120/= general damages, together with costs and interest at court rates from the date of filing the suit until payment in full. Orders accordingly.

**Dated and delivered at Nairobi this 5th day of March 1987.**

**S.E.O. BOSIRE**

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**JUDGE**