



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

**AT NAIROBI**

**CIVIL CASE NO 50 OF 1981**

**MIRITI.....PLAINTIFF**

**VERSUS**

**FIROZE CONSTRUCTION LTD.....DEFENDANT**

**JUDGMENT**

By his plaint, the plaintiff claims that at all material times, the defendants were constructing a bypass road within the Embakasi area within Nairobi, that in the course of the construction, the defendants effected excavations which they wrongfully allowed to remain uncovered and to be filled with water and thus to constitute a nuisance and that on February 16, 1979, the plaintiff's son, then aged 5 1/2 years, drowned in the said water and died.

The plaintiff alleged that the defendants were negligent in allowing the excavation to be filled with water, in permitting the excavation filled with water to remain and/or to become an allurements to the plaintiff's son and in failing to fence-off or to give any warning of the danger created by the excavation.

There is also a claim for special damages.

There was no appearance for the defendants on the hearing date which had been taken by the consent of the parties to the suit.

A memorandum of appearance was entered by a firm of advocates for the defendants and a defence filed by the same firm of advocates. The plaintiff said that on February 16, 1979, his son, then aged 5 1/2 years, drowned in the water in the excavation made by the defendants during the time they constructed a bypass road within Embakasi. According to the plaintiff, there was no notice to show that the excavation which was some 550 paces away from the plaintiff's house, was dangerous.

The plaintiff said his deceased son, his first child, was in Nursery School and that the deceased would have grown up and have been prepared to support his parents. The plaintiff, who is a Security Warden, said his wife, the mother of the deceased, is a PI School teacher. It was stated that the estate of the deceased child had suffered loss.

A Police officer was informed of the episode while he was on duty at the Embakasi Police Station. The Police officer and others hurried to the pool of water, found the deceased child in water, took out the child and rushed him to the Kenyatta National Hospital where a doctor certified the child dead. The Police Officer confirmed that the excavation which had the pool of water had been dug by the defendants and that he used to see the equipment and the employees of the defendants about the place. There was no

notice or warning of the excavation.

There is a claim of special damages in respect of funeral expenses. There is no reason for doubting the plaintiff's evidence and that of the Police officer who testified in support. It is proved on the evidence that the defendants made the excavation and that they were negligent as alleged in allowing it to be filled with water and in failing to install any warning notice or mechanism. The excavation was about 350 paces from the plaintiff's house. That is the more reason why the defendants should have taken steps to warn all of its presence. It was never the duty of the plaintiff to place any warning notice close to the excavation. There is no evidence that the plaintiff contributed in any manner to the deceased getting close to the excavation. The deceased child appears to have been attracted by the pool of water in the excavation. It is not unreasonable for a child of that age to be tempted to enter such water and play in it.

I would find it proved that the defendants were negligent to the extent stated by the plaintiff.

A sum of Kshs 4,000 is claimed against the funeral expenses. In the particular circumstances of the case, I would approve the sum of Kshs 4,000 claimed as special damages to cover funeral expenses vide Fatal Accidents Act (Cap 32). There is no doubt that the plaintiff has suffered loss as a result of the death of his first son. Ordinarily the plaintiff and his family would have expected the deceased to grow up and assist his parents in their old age and help with the education of his brothers and sisters. It is obvious that the estate of the deceased has suffered loss. The claim for damages is made under Fatal Accidents Act (Cap 32) and under the Law Reform Act (Cap 26). This action is maintainable under Sections 3 and 4 of the Fatal Accidents Act and under Section 2 of the Law Reform Act.

There is considerable uncertainty as to what the deceased would have become and therefore the extent to which he would have benefited his parents and his estate. All that could be said is that the deceased, whose parents are above average in general overall ability, would have grown to lead a normal happy life like that of any child of parents who have good basic education coupled with professional qualification. The deceased would of course have had to live with the usual uncertainties of life. In assessing damages it is best to opt for a modest figure, given the general uncertainties pertaining to the deceased's expectation of life. In the case of *Waweru v Kenya Railways Corporation*, HCCC 1883 of 1978 (unreported) an award of Kshs 50,000 for general damages was made in respect of a thirteen year old minor who was lured by a pool of water and who died whilst swimming in a water logged stone quarry.

The deceased here was aged only 5 1/2 years. He was in nursery school. There is nothing to suggest that the deceased child would not have continued at school but with the obvious improbable factors such as illness or failure to make the required grades of school work or training course. There is also the fact that the parents of the deceased have to be compensated in some way for pain and suffering. The award should take care of the inflation and devaluation of the Kenya Shilling.

Having regard to all the relevant circumstances and doing the best I can, I would award a sum of Kshs 70,000 general damages under the Fatal Accidents Act and Law Reform Act. I would additionally award a sum of Kshs 15,000 representing pain and suffering plus Kshs 4,000 special damages making a total of Kshs 89,000. On the facts of the case and given the current purchasing power of the Kenya shilling, the award is, in my judgment, moderate.

**Dated and delivered at Nairobi this 21st day of September, 1982.**

**J.O Nyarangi**

**JUDGE**