



Kimani & another (Suing as the Personal Representative of the Deceased) v Macharia & another (Civil Case 722 of 2021) [2025] KEMC 119 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEMC 119 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE 722 OF 2021
PA NDEGE, SPM
FEBRUARY 20, 2025**

BETWEEN

TABITHA WANJIKU KIMANI & SAMUEL KARIUKI KIARIE (SUING AS THE PERSONAL REPRESENTATIVE OF THE DECEASED) PLAINTIFF

AND

SIMON MAINA MACHARIA 1ST DEFENDANT

GIBSON GITHAKA 2ND DEFENDANT

JUDGMENT

1. This is as a suit that was brought by a plaint dated 30th July 2021 and filed on 11th August 2021. The plaintiff herein, Tabitha Wanjiku Kimani and Samuel Kariuki Kiarie, have sued as the personal representative of the deceased Patrick Mbugua Kiarie, who succumbed after being knocked down by the 1st defendant, Simon Maina Macharia's vehicle, then that being driven by the 2nd defendant; Gibson Githaka. They are seeking the following reliefs from the honorable court.
 - i. General damages under the Fatal Accidents according Act (cap 32) and the Law Reforms Act (Cap 26) for: pain and suffering, financial loss, loss of amenities, loss of care, guidance and companionship.
 - ii. Special damages of Ksh.26,530/=as particularized in the plaint.
 - iii. Damages for undocumented burial expenses.
 - iv. Interest on (a) and (b) above at court rates from the date of filing suit until judgment and thereafter interest on the decretal amount from the date of judgment until payment in full.
 - v. Cost of suit and interests thereto.



2. The defendants were duly served with the plaint and summons and the firm of Murimi, Ndumia, Mbago & Muchela advocates who entered appearance on their behalf and filed their response (defence) to the plaint.
3. This matter was set down for mention on 2nd October 2023, when the parties herein recorded a consent on liability at the ratio of 90:10 in favor of the plaintiffs. They also agreed to adopt the documents and statement without calling the makers. It was then agreed that parties file and exchange their written submissions on quantum.
4. On 13th February 2024, Ms. Chepchirchir was present for the plaintiff, while Mr. Ombewo appeared for the defendant. It was then confirmed that only the plaintiffs had filed their submissions. This court shall therefore proceed to consider the issue herein without the benefit of the defendant's submissions.
5. Under the *Fatal Accidents Act*, the plaintiff is mainly expected to claim loss of Dependency. This is given to the estate of the deceased to compensate for the lost income it would have benefited had the deceased lived.
6. The deceased herein was 39 years old and was a businessman who dealt with purchase and supply of farm produce from Mau Narok and delivering them at Njoro Kaptembwa market. He was survived by 6 dependants as per the plaint and the birth certificates admitted herein. There was however no proof of his earning, no proof that his children were in school or that he provided for his family. None of the dependents filed statements herein and even though there is the Court of Appeal decision in *Jacob Ayiga Maruja & Another - Versus - Simon Obayo (2005) eKLR* where a bench of Omolo, Tunoi and Githinji JJA stated that proof of earning need not come from documentary records only, I find no any other evidence herein to prove the deceased's income and the dependency pleaded herein. I do therefore stand guided by the decision of the High Court in *Beatrice W. Murage - Vs - Consumer Transport Ltd & Another (2014) eKLR* where Justice Wendo was of the view that: -

Ordinary if one does not prove what the deceased earned, the court would base the earnings on the Minimum wage. However, in this case the minimum wage cannot apply because the deceased was beyond employment age and that is totally no evidence that he earned anything for a living.

7. In this case therefore, the minimum wage and multiplier formulae method which only apply where the occupation and the earnings of the deceased are not in doubt, are not appropriate. The global formulae method is the most appropriate here.
8. Dependency is a matter of fact and must be proved by evidence as was held in *Abdalla Rubeya Hemed - Vs - Kayuma Mvurya & Another (2017) eKLR* as follows: -

Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence.

Rather the claimant must give evidence to show that he was dependant upon the deceased and to which extent.

9. There is a list of the plaintiffs herein as witnesses, but there was not actual statement of the plaintiffs or the other dependants in the file. Whereas there is proof from the other witness statements filed herein that the deceased was a supplier - there is no proof of his average income, and minimum wages do not also apply to traders. I will thus award a global sum of Ksh.800,000/= for loss of dependency.
10. Damages under the *Law Reform Act* includes pain and suffering and lost life. From the Death Certificate herein, the deceased died 2 days after the accident. He thus endured extreme pain before his



- death. In *Sukari Industries - Vs - Clyde Machimbo Jume HCCA No.68 of 2015 (2016) eKLR* it was stated that nominal damages will be awarded on this head for deaths occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. In the case of *Kenya Red Cross - Vs IDS (suing as the legal representative of the estate of MDR (deceased) (2020) eKLR*, the appellate court upheld the decision of the trial court which awarded Ksh.100,000/= for pain and suffering. Learned counsel for the plaintiff has submitted for an award of Ksh.150,000/= under this head and I do hereby agree with the same. The deceased herein indeed endured much pain and suffering for a prolonged period of time before death. The Ksh.150,000/= proposed herein is fair and sufficient being compensation for pain and suffering.
11. On loss of life expectancy, the deceased herein died at the age of 39 years. No evidence was tendered as to his state of health prior to his death, learned counsel for the plaintiff has proposed Ksh.200,000/= . I do agree and award the same herein.
 12. The plaintiff also pleaded the following as special damages: -
Special damages
 - i. Police Abstract - Kshs. 200/=
 - ii. Copy of motor vehicle records - Kshs. 550/=
 - iii. Receipted medical/funeral expenses Ksh.25,780/=
 Total Ksh.26,530/=
 13. I find no proof of Ksh.200/= for the police abstract and Ksh.550/= for copy of motor vehicle records. There were various records and receipts to prove the funeral expenses which were totaling to more than the amount claimed. Given that parties are bound by their pleadings, I do hereby award Ksh.25,780/= pleaded as the funeral expenses.
 14. All the other relief sought are not awardable. The dependant or the plaintiffs did not testify or produce their statements to prove the loss of amenities, care, guidance and companionship claimed and these are all hereby dismissed for want of proof.
 15. All the awards herein are subject to the plaintiff's 10% contribution as was consented to herein.
 16. I do therefore assess the general damage awarded here as follows: -
 Under the *Law Reform Act*
 Pain & suffering - Ksh.150,000/=
 Loss of expectation of life - Ksh.200,000/=
 Under the *Fatal Accidents Act*
 Loss of dependency - Ksh.800,000/=
 17. Relying on Justice Kariuki's interpretation in *John Wamae & 2 Others - Vs - Jane Kituku Nziva & Another (2017) e KLR* I do hereby find that the Ksh.350,000/= awarded under the *Law Reform Act* has been adequately factored in the Ksh.800,000/= award under the Fatal Accident Act. I do therefore find that the plaintiff hereby are entitled to Ksh.800,000 as the general damages herein.
 18. Judgment is therefore hereby entered in favor of the plaintiffs and against the defendant's as follows: -
 - a. General damages - Ksh.800,000/=
 - b. Special damages - Kshs. 26,530/=



Gross Total - Kshs. 826,530/=

Less 10% Ksh.82653/=

Net Total Ksh.743,877/=

19. The plaintiffs also get the costs and interest at court rate.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN DATED THIS 20TH DAY OF FEBRUARY 2024.

In the presence of: -

Chepchirchir holding brief Wanga present for plaintiff

Ombewa present for defendant

Plaintiff

1st defendant absent

2nd defendant Hon. A. P Ndege SPM

Ombewa - praying for 45 days stay

Chepchirchir - I do agree

Court - 45 days stay allowed as agreed.

Hon. A. P Ndege SPM

20th February 2024

