



Kahura & another (Suing as the Legal Representatives of the Estate of the Late Joseph Kahura Gitonga - Deceased) v Wachira & another (Civil Suit E152 of 2023) [2024] KEMC 166 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEMC 166 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E152 OF 2023
PA NDEGE, SPM
MAY 30, 2024**

BETWEEN

KEZIAH WANGUI KAHURA & MARTHA NYAMBURA KAHURA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JOSEPH KAHURA GITONGA - DECEASED) PLAINTIFF

AND

JOSEPH KARANU WACHIRA 1ST DEFENDANT

MOSES MWANGI NJOROGE 2ND DEFENDANT

JUDGMENT

1. The plaintiffs in this matter instituted this case vide a plaint dated 20th February 2023 where they alleged inter alia that the deceased was a lawful passenger in motor vehicle registration number KCE 688J travelling along Nakuru-Nyahururu highway and specifically at Githioro area when due to the negligent manner in which the motor vehicle registration number KCF 891M was being driven by the 2nd defendant, it collided with motor vehicle registration number KCE 688J and as a result the deceased sustained fatal injuries. The defendants on their side filed a memorandum of appearance and statement of defense dated 28th April 2023.
2. In this matter, and from the facts herein, that an accident indeed occurred on the 14th July 2022 involving the vehicles of registration numbers KCE 688J and KCF 891M is not disputed. Neither is it in dispute that the deceased was in motor vehicle registration number KCE 688 headed to Nyahururu, alongside other passengers and that the 2nd defendant herein was driving motor vehicle registration number KCF 891M at the time of the accident.
3. This matter proceeded for hearing on 24th October 2023 with the plaintiff calling 6 witnesses who basically relied on their statements and also produced several documents to prove their case against the



defendants. The issues for consideration herein are on the apportionment of liability and assessment on the quantum of damages.

Liability

4. The defendants contend that liability should be apportioned in the ration of 50-50 because the defendants and the plaintiffs were equally to blame for the causation of the accident while the plaintiffs contend that the defendants was wholly to blame for the causation of the accident.
5. In regards to the same, Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya, as held in the case of *Evans Nyakwana V Cleophas Bwana Ongara (2015) eKLR*, lays down the principle that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In this matter, the duty lies on the plaintiff to prove his allegation of negligence on a balance of probabilities. In ascertaining the same, the plaintiff's witnesses, PW1, PW2, PW3 and PW4' evidence is to be considered.
6. In the instance where the court is unable to determine who is to blame, it will then apportion liability equally between the parties as illustrated by the court of appeal in *Hussein Omar Farar V Lento Agencies. No. 34/2006 (2006) eKLR* where it observed that;

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for both accidents. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame

7. The evidence adduced by PW2 who was an eye witness being in the same vehicle as the deceased at the time of the accident puts the blame, and hence shifts the evidential burden, on the part of the 2nd defendant who was driving motor vehicle registration number KCF 891M which left it's lane at the time of the accident. There was however no evidence tendered by the defense.
8. The Court of Appeal in *Robinson -vs- Oluoch (1971) EA 376* stated –

The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying, as Mr. Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what S. 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident.

The respondents in this matter have failed to plead in this case that the plaintiff or any other person was also negligent on their part, the negligence which occasioned or contributed to the accident.

9. In *Caroline Endovelia Mugayilwa V Lucas Mbae Muthara [2016] eKLR*, the court apportioned liability in the following manner; Defendant -45%, Third party- 45% and plaintiff- 10% due to the



inconsistent nature of the plaintiffs witness testimony which the court found as being tailored towards getting the court to decide in their favor. The learned judge in this matter stated that

The Plaintiff should also take responsibility for some negligence as she did not deny that she was seated at the back of the pick-up on a bench without any seat belt on. This meant that even very little impact on the pick-up would have led to injuries being inflicted on the Plaintiff

The plaintiffs evidence in this instance is however not subject or exposed to any inconsistencies as far as I am concerned and it clearly seem to point to the defendants as the causative agents of the accident.

10. Similarly, in *Masembe V Sugar Corporation And Another* [2002] 2 EA 434, it was held that:

When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.

11. Taking into consideration the plaintiffs witness testimony by PW2 and PW3, I find the defendants liable for the accident. Their motor vehicle registration number KCF 891M left its lane at the time of the accident and collide with the plaintiff's vehicle which was on its lane. Furthermore, since the impact was at the left-side door, it can be alluded that motor vehicle registration number KCE 688J tried to avoid the collision on its end by evading the first part of the vehicle as it was swerving to avoid the same. The plaintiff's in this matter have proved their case on the balance of probabilities. In this matter, I find that the defendants failed to prove their case in regards the negligence on the part of the deceased and the driver of motor vehicle registration number KCF 891M. I therefore apportion 100% liability to the respondents.

Damages Under Law Reforms Act

12. It is common ground herein that the deceased died at the age of 72 and that prior to his death he was a farmer earning about Kshs 100,000 and that he enjoyed good health and led a happy and vigorous life. As a result of the death of the deceased, his estate suffered loss, damage and his dependents suffered a lot of emotional pain and damage as well as expenses.
13. Damages in respect to the *Law Reform Act*, makes include pain, suffering and lost life. In the matter herein, the plaintiffs' counsel submitted that damages for pain and suffering are determined by the length of time, that the deceased had to endure pain before death.
14. The deceased died 3 days after the accident. I rely on the case of *Petronila Muli V Richard Muinde Mwindu* (2021) eKLR where the court awarded Ksh.100,000 for a deceased person who died 3 days after the accident. I grant Ksh.150,000 as prayed by the plaintiffs advocate taking into consideration the passage of time since the quoted case was decided.
15. In respect to loss of life expectancy, the deceased was aged 72 years at the time of his death. Noting that he was an adult with high expectations, an award of Kshs. 100, 000 would be sufficiently justified, considering that he had no prior health issues and was expected to live a fairly considerable long life of at least 80 years. A similar amount for loss of expectancy was awarded in the *Moses Maina Waweru V Esther Wanjiru Githae* (2022) eKLR where the trial court awarded Kshs 200,000 for pain and suffering and Kshs 100,000 for loss of expectation of life as under the Law Reforms Act.



Damages Under The *Fatal Accidents Act*

16. . In regards to damages pleaded under the *Fatal Accidents Act*, recognition is made to sentiments conveyed by Justice Ringera, in *Kwanzia V Ngalah Rubia And Another*, where the Learned Judge observed that the application of the multiplier approach is only viable where the ascertainment of the age of the deceased, amount of annual or monthly dependency and the expected length of the dependency can be determined without speculation or being speculative.

17. Considering the particulars of the matters herein, the deceased was an adult aged 72 years, who at the time of death, was a farmer (self-employed), thus the calculation of the amount of annual earning will be by a way of multiplier since her earned 100,000 annually has been proved by plaintiff exhibits number 11A, B and C. There was material laid out herein to challenge the amounts.

18. In *Beatrice Wangui Thaini V Hon Ezekiel Bargetuni And Another* NRB HCC 1638 of 1998(UR) Ringera J (as he then was) stated:

The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

19. The court in *VASSAM v Kampala Aerated Water Co Ltd* [1965] 1 WLR 668 rightly stated:

That the exercise of this discretion sometimes is a matter of speculation and may be conjecture.

In the instant appeal, the deceased was aged 79 years. survived by the claimant. Without certainty, if the court would have applied the multiplier formulae may estimate multiplicand of 4-5 years or income of Kshs. 1 8,000/= per month it would have been an appropriate estimate life expectancy to consider, in calculating dependency on this multiplier as the period of dependency the award of over Kshs.600,000=. With this in mind, the consideration of a global approach have been too generous for the matter. The fundamental evidence of the deceased good health, evidence as to the income of the deceased and dependency remained uncontroverted.

20. In view of the above cases, I hereby adapt the multiplier approach in awarding the damages. The deceased was at the time of death 72 years and he was a farmer earning Kshs 100,000. I apply a multiplicand of 1/2 since he had 1 dependent being the wife. His 7 children were adults as proved by plaintiff exhibits and hence were not fully dependent on the deceased.

21. I do therefore assess general damages herein as follows;

Under the *Law Reform Act*:

- I) Pain & Suffering: Kshs, 150,000
- ii) of Expectation of Life: Ksh.100,000

Under the *Fatal Accidents Act*:



- iii) Loss of Dependency: $1/2 \times 1 \times 100,000 \times 10 =$ Kshs. 500,000
22. Accounting for the observations made in John Wamae \$ 2 Othere V Jane Kituku Nziva & Another (2017) eKLR, I do hereby find that the award of damages under the Law Reforms Act, assessed for both pain and suffering and loss of expectation of life as Kshs 250,000 has been adequately factored in the award of 500,000 under the *Fatal Accidents Act*.
23. Of all the special damages pleaded, the plaintiff has been able to prove the mentioned amount in the plaint, being, Kshs. 246,090, vide annexed receipts for medical expenses, post mortem, funeral expenses, legal fees for obtaining grant and copy of records charges totaling to the amount stated above.
24. Judgement is therefore hereby entered in favor of the plaintiff and against the defendant as follows:
- I) General Damages: KSH.500,000
 - II) Special Damages: KSH.246,090
- Net Total: KSH. 746,090
- Costs are similarly awarded to the plaintiff and interests at court rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 30th DAY OF May 2024.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Ngure present for plaintiff

Cherotich present for defendant

Cherotich: Praying for 45 days stay and copy of the judgment

Ngure: 30 days sufficient

Cherotich: 30 days then

30/05/2024

Court: 30 days stay of execution granted and certified copy of the judgment be supplied to the defense upon payment of the necessary costs.

