



**Mwangi (Suing as the Legal Representative of the Estate of MWM - Deceased) v
Chege (Civil Suit E080 of 2022) [2024] KEMC 165 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 165 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E080 OF 2022
PA NDEGE, SPM
JULY 11, 2024**

BETWEEN

**SOFIA WANJIRU MWANGI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF MWM - DECEASED) PLAINTIFF**

AND

SAMMY KAMAU CHEGE DEFENDANT

JUDGMENT

1. The Plaintiff herein, instituted this suit against the Defendant vide a plaint dated 12th May 2021. The Plaintiff is supplemented by a verifying affidavit, filed on the same date as the Plaintiff. In the said plaint, the Plaintiff is before this Court seeking general and special damages, costs and interests at court's rates. The matter herein stems from a road accident that resulted in the death of Milkah Wairimu Mwangi, the Plaintiff's child.
2. As per the particulars of the Plaintiff, it is claimed that on or about the 19th June 2018, the Defendant, being the owner of motor vehicle registration number KCF 203K, so negligently drove, managed and/or controlled the subject motor vehicle, which lost control veered off the road and rolled several times, consequentially occasioning the death of the Plaintiff's child; Milkah Wairimu Mwangi.
3. The Plaintiff avers that on the fateful day of 19th June 2018, her daughter, Milkah Wairimu Mwangi (deceased) was a lawfully fare-paying passenger, aboard the motor vehicle owned and/or managed by the Defendant. Furthermore, the Plaintiff contends that the accident that occurred on the said date, was solely as a result of the Defendant's negligence. The plaintiff pleaded the particulars of the Defendant's negligence as follows:-
 - a. Losing control of the said motor vehicle, registration number KCF 203K
 - b. Failing to have sufficient regard to passengers, particularly, Milkah Wairimu Mwangi (deceased)



- c. Permitting the aforementioned motor vehicle, to viciously roll
- d. Driving at an excessive speed in the circumstances.
- e. Driving without due care and attention.
- f. Failing to stop, break, slow down, swerve and/or in any other manner, control the said motor vehicle so as to avoid the accident.
- g. Disregarding highway and traffic rules
- h. Res Ipsa Loquitur.

The Plaintiff thus contends that the Defendant is wholly liable and that this Court should give judgement in her favor, as against the Defendant herein.

4. The Defendant herein entered appearance on 10th March 2023, and filed his statement of defense dated 10th March 2023. However, during the hearing, only the plaintiff adduced evidence in support of her case. After the close of the hearing, submissions were filed for the plaintiff only.
5. The Defendant in his Statement of Defence, however, denied that all the particulars of the Plaint herein as false. He refutes all liability placed on him by the Plaintiff. The Defendant alleges the said motor vehicle KCF 203K, was not driven by him at the time of the alleged road accident that led to the demise of Milkah Wairimu Mwangi.
6. In summary, the Defendant denies all allegations against him by the Plaintiff and that the driver of the motor vehicle herein should bear liability as to the accident herein mentioned. The Defendant further alleges that the accident herein, if indeed it occurred, then it was caused by the deceased's negligence, the particulars of which are:-
 - i. Failing to take any adequate precaution for her safety
 - ii. Failing to heed the instructions on safety precautions when travelling.
 - iii. Failing to heed the traffic rules and regulations on travelling.
 - iv. Failing to buckle the seat belt.

After assessment and scrutiny of the Plaintiff's case, evidence and written submissions filed on her behalf and the Defendant's case, I do hereby find that the issues arising for determination by this Court are: Liability and Quantum of Damages

Analysis & Determination

Issue No. 1; Liability

7. As pleaded by the Plaintiff, it is alleged that the Defendant herein, being the owner of the motor vehicle registration number KCF 203K, was the driver of the said motor vehicle on the day that the road accident occurred. The Plaintiff has proved and corroborated this allegation of fact with supporting documents in the form and substance, for example, the police abstract and a motor vehicle search, affirming that indeed, the Defendant is the owner of the said motor vehicle herein. The police abstract further provides corroborative evidence as to the ownership of the said motor vehicle. Further, there was no evidence tendered by the defendant to disprove the same.
8. The Defendant thus failed to provide evidence as to whether or not he was the driver or owner of the motor vehicle registration number KCF 203K on the fateful date of the accident. The Defendant



ought to have adduced evidence in support of the averments made in his statement of defense. It is therefore the finding of this Court, that the Defendant herein, being the registered owner of motor vehicle registration number KCF 203K, is liable in the matter herein, whether as the driver or owner of motor vehicle that occasioned the death of the Plaintiff's daughter, Milkah Wairimu Mwangi.

9. In the case of *Kerongo v Wambogo & 2 others* [2024] KEHC 6131 (KLR), the Court made inference to the fact that failure by a Defendant to adduce evidence in support of their defence means that the defence remains merely as unsupported allegations. This sentiment was reiterated by the court in *Aexcel Auto Spares Limited v Siyama Company Limited* [2019] eKLR. I thus have no reason not to find the defendant herein 100% liable.

Issue No.2: Quantum of Damages.

10. The *Evidence Act*, under Section 107, specifically provides that:
 - A. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - B. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
11. In addition to the aforementioned, in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

12. On the issue of damages, the Plaintiff is seeking both special and general damages. In *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (1992) KLR 177, the Court pronounced itself stating that: -

The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.

Special Damages

13. With respect to the award of special damages, the law prescribes that special damages, ought to be specifically pleaded. This was the court's position in *Jogoo Kimakia Bus services ltd v Electrocom International Ltd* (1992) KLR 777, (supra) where it stated that...'special damages are precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.' Accounting for the same, the Plaintiff has adduced evidence proving the special damages claimed herein of Kshs. 2,000, being the court fees for filing a limited grant ad litem. I thus do hereby award the same as special damages pleaded and proved herein.



General Damages

Loss of dependency

14. Making reference to damages pleaded under the *Fatal Accidents Act*, the Superior Court in Stanwel Holdings Limited & Another V Racheal Haluku Emanuel & Another [2020] eKLR referred to Justice Ringera, in *Kwanzia v Ngalah Rubiah 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.
15. Considering that the deceased herein was a minor, the calculation of the annual or monthly dependency would be speculative, thus, the best approach to undertake an award under this head is the global sum approach. This was the court's position in the case of *Charles Ouma & Another v Benard Odhiambo Ogeche* (2014) e KLR, where, Sitati J specifically highlighted that;

As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.

16. Taking into account that the deceased was a minor, it does not negate the fact that her parent stood to benefit from her, i.e. would be dependent on her, should she have grown up into adulthood. As expressed in *Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters & 5 others* (1986) e KLR, parents stand to benefit from their children, irrespective of their age. A congruent opinion was given in the case of *Kenya Breweries Limited v Saro* {1999} KLR, where the court observed that:-

...the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.

In *Daniel Mwangi Kimemi & 2 others v J G M & another* (the personal representatives of the estate of N K (DCD) [2016] eKLR, the Court therein made an award of Kshs. 1,153,000 for general damages under the head of loss of dependency. The amount was subsequently lowered to Kshs. 900,000 upon appeal. The deceased therein was aged 9 years. In another case of *Chhabhadiya Enterprise Ltd & Another v Gladys Mutenyo Bitali* (Suing as the Legal the Administrator and Personal Representative of the Estate of the late Linet Simiyu) {2018} eKLR, where after review on appeal, the court awarded Kshs. 700,000 for loss of dependency, considering that the deceased was a class 4 pupil. Similarly, in *Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased)* [2020] eKLR (CIVIL APPEAL NO. 31 OF 2019), the deceased therein was aged 7 years at the time of death, and the court awarded Kshs. 900, 000 for loss of dependency. I do therefore agree with the learned counsel's proposal of Kshs. 1,500,000/= would adequately compensate for loss of dependency factoring the current economic upshot.



Pain & Suffering

17. With respect to the Law Reform Act, in *Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased)* (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR), the court making reference to the award of damages under the Law Reform Act stated that higher damages will be awarded if the pain and suffering is prolonged before the death. The court therein awarded Kshs. 50,000 for pain & suffering, owing to the fact that the deceased died instantly, succeeding the fatal accident. A similar award was made in the case of *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR. Considering lapse in time, I do agree with the learned counsel for the plaintiff's proposal that a sum of Kshs. 100,000/= would adequately compensate for pain and suffering in this case where the deceased did not die immediately.

Loss of Expectation of Life

18. Accounting for the age of the deceased herein, it is clear that the deceased aged 14 years, was a young girl, whom had her whole life before her. She was still a student and thus, was expected to have a bright future and career. In *Anthony Konde v RMC* case (supra), the court awarded Kshs. 150,000 for loss of expectation of life, for a child aged 7 years at the time of death. I thus do also agree with the learned counsel for the plaintiff that an award of Kshs. 200,000/= would adequately compensate for loss of expectation of life.

Duplication of awards

19. Where it evident that there is a duplication of awards due to the award of damages under the different heads in respect to the claims under the Fatal Accident Act and the Law Reform Act, the court will have to factor the awards in either of the Acts so as not to overcompensate the estate. I do therefore assess the general damages awardable herein as follows:

Law Reforms Act:

Pain and Suffering: Kshs. 100,000/=

Loss of Life Expectancy: Kshs. 200,000/=

Fatal Accidents Act

Loss of Dependency: Kshs. 1,500,000/=

20. So as not to overcompensate the plaintiff, I do hereby find that the awards under the Law Reform Act have been adequately taken care of in the award under the Fatal Accidents Act. I do therefore award the plaintiff herein general damages to the tune of Kshs. 1,500,000/= only.

21. Judgment is therefore hereby entered in favor of the plaintiff at Kshs. 1,502,000/=, costs and interests.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 11th DAY OF July 2024.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Achieng'

Defendant's counsel:



Plaintiff:

Defendant:

