



Njeri (Suing as the Legal Representative and Administrator of the Estate of David Kihenjo Jospine (Deceased)) v Britken Hawliers Limited (Civil Case E924 of 2022) [2024] KEMC 158 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEMC 158 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE E924 OF 2022
PA NDEGE, SPM
JULY 2, 2024**

BETWEEN

JANE WAMBUI NJERI PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE
ESTATE OF DAVID KIHENJO JOSPINE (DECEASED)**

AND

BRITKEN HAWLIERS LIMITED DEFENDANT

JUDGMENT

1. The plaintiff filed his Complaint dated 11/11/2022, in his capacity as the Legal Representative of the Estate of David Kihenjo Josephine, seeking General and Special Damages under the Law Reform Act and Fatal Accidents Act, costs and interests and any other/further further relief that the court may deem fit to grant.
2. It is common ground herein that the deceased herein lost his life following a fatal accident which occurred on 17/04/2021 along Nairobi- Nakuru Highway at Stem Hotel area for which the parties herein have already recorded a consent judgment on liability at the ratio of 50:50.
3. There is only remaining one issue for my consideration herein. It is the quantum of damages payable herein, if any. Both parties herein filed and, I do believe, exchanged their written submissions citing various impressive authorities in support of their respective positions on the issue.
4. It is common ground herein that the deceased died at the age of 34. He left behind the plaintiff as a widower, and 3 sons, one of whom is an adult. There was no evidence tendered as to the deceased's source of livelihood or income. The learned defence counsel has however conceded that the deceased must have been engaging in some income generating activities for his survival and that of his family.



He submitted and/or conceded to an award of Kshs. 1,158,552/= which I do hereby award for loss of dependency under the *Fatal Accidents Act*.

5. Damages under the *Law Reform Act* includes Pain and Suffering and Lost life. It is common ground herein that the deceased died on the spot. Counsels herein agree, and it is trite, that damages for pain and suffering are determined by the length of time that the deceased had to endure pain before death. This was aptly pointed out in the case of *Loise Wairimu Mwangi & Another vrs Joseph Wambue Kamau* (2006) e KLR. The court is thus guided by the proposals by the parties and in reliance on the case of *Sukari Industries Limited vrs Clyde Machimbo Juma HCCA No 68 of 2015* where Majanja J in arriving at an award of Kshs. 50,000.00 was of the view that higher damages will be awarded if the pain and suffering is prolonged before the death. Be that as it may, there exists a great deal of precedents to the effect that courts tend to award nominal damages under this head, mostly in cases where the deceased died on the spot or on the date of the accident, mostly Kshs. 10,000/=. I however do hereby find that that conventional amount to be too old, hence outdated, and has been overtaken by inflation and the rise in cost of living. Recent authorities such as *Masonik & Another vrs Cheruiyoy* (suing as The Legal Administrator of The Estate of Stanley Kipchumba, Deceased) [2022] KEHC 11823 (KLR), has awarded Kshs. 50,000/= for pain and death. Counsel for the plaintiff however submitted for Kshs. 20,000/= under this head and I thus do therefore agree that Kshs. 20,000/= would suffice as damages for Pain and Suffering.
6. On loss of life expectancy, the deceased herein died at 34 years old. No evidence was tendered as to his state of health prior to his death. Learned counsel for the Plaintiff has proposed a sum of Kshs 250,000/=, while the learned defence counsel have proposed Kshs. 100,000. I do agree with the learned counsel herein that a conventional sum is awardable herein. In *Henry Omweri Oroo & Another vrs Samuel Mungia Kahiga & Another* [2016] e KLR, which was impressively submitted by the learned counsel for the Defendant, the deceased died at the age of 33 years and the High Court awarded Kshs. 100,000/= for lost life (loss of expectation of life). That was in 2016, and considering the rise in cost of living in present times, I do enhance the same and do award Kshs. 170,000/= for loss of expectation to life.
7. Opinion is divided as to whether the award for loss of dependency under the Fatal Accident Act shall be awarded less those for Pain and Suffering and Loss of Life expectancy awarded under the Law Reforms Act, as held by Justice Wendo in *Richard Macharia Nderitu vrs Philemon Rotich Langas* [2013] e KLR. The learned judge, relying on the Court of Appeal decision in *Kemfro Africa Ltd vrs A. M. Lubia* [1982-85] 1 KAR 727, found that when the people entitled to the deceased's estate are the same persons for whose benefit the action over the *Fatal Accidents Act* is brought, such as in the present case, the award for loss of expectation to life is deductible. She then proceeded to deduct the same. That was equally the position by Justice R. N. Sitati in *Makario Makonye Monyancha vrs Hellen Nyangena* [2014] eKLR.
8. Justice Kariuki, however, in *John Wamae & 2 Others vrs Jane Kituku Nziva & Another*, supra, interpreted the same Court of Appeal decision which provided as follows:

...the net benefit will be inherited by the same dependants under the *Law Reform Act* and that must be taken into account in the damages awarded under the *Fatal Accidents Act* because the loss under the latter Act must be offset by the gain from the estate under the former Act...

This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that – ‘the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the *Fatal Accidents Act*. Anyway, the principle



that is a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and, in my judgment, should be applied in Kenya.

9. In Justice Kariuki's view, the words 'take into account' do not make it mandatory that the sums be deducted. To buttress his view, he cited the case of *Peres Wambui Kinuthia & Another vrs S.S. Mehta & Sons Limited*, Nairobi Civil Appeal No. 568 of 2010 (UR) where Justice Mabeya held that: -

In the case of *Kemfro Africa t/a Meru Express Services (1976) & Anor – vrs – Lubia & Anor (No 2) (1987) KLR 30* the Court of Appeal was categorical that the words 'to be taken into account' and 'to be deducted' are two different things. That the words used in Section 4(2) of the *Fatal Accidents Act* are 'taken into account'. That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court says that in reaching the figure awarded under the *Fatal Accidents Act*, the trial court bears in mind or considers what has been awarded under the *Law Reform Act* for non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction.

10. I do therefore assess the general damages herein as follows:

Under the *Law Reform Act*:

Pain and Suffering: Kshs. 20,000.00

Loss of Expectation of Life: Kshs. 170,000.00

Under the *Fatal Accidents Act*:

Loss of Dependency: Kshs. 1,158,552.00

11. Relying on Justice Kariuki's interpretation hereinabove, I do hereby find that the Kshs. 190,000/= award under the *Law Reform Act*, has been adequately factored in the Kshs. 1,158,552/= award under the *Fatal Accidents Act*. I do therefore find that the plaintiff herein is only entitled to a sum of Kshs. 1,158,552/= as general damages herein.

12. On the award of special damages, it is now firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded by the court. Suffice it to quote from the decision of the Court of Appeal in *Hahn vrs Singh V. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

13. In this regards, Courts have naturally insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. On this, I do agree with the learned counsel for the defendant's written submissions that the evidence in the receipts herein are meaningless as this court has failed to interpret the fadings in the receipts. They are not legible and cannot be relied in awarding damages. An award on this subhead cannot be made based on inelible documents. I therefore find the special damages as unproved.
14. Judgment is therefore hereby entered in favour of the plaintiff and against the defendants for Kshs. 1,158,552/=, less 50% plaintiff's contribution, which leaves a net of Kshs. 579,276/=; costs and interest.



DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 02nd DAY OF July, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: n/a

Defendant's counsel: n/a

Plaintiff: n/a

Defendant: n/a

