



Mutura & another (Suing as the Administrators of the Estate of Samwel Kiarie Njuguna aka Samuel Kiarie Njuguna - Deceased) v Nyariki aka Andrew Nyariki Isoe (Civil Case E340 of 2022) [2024] KEMC 163 (KLR) (3 September 2024) (Judgment)

Neutral citation: [2024] KEMC 163 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE E340 OF 2022
PA NDEGE, SPM
SEPTEMBER 3, 2024**

BETWEEN

JOHN NJUGUNA MUTURA & EZEKIEL NGANGA MUTURA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF SAMWEL KIARIE NJUGUNA AKA SAMUEL KIARIE NJUGUNA - DECEASED) PLAINTIFF

AND

ANDREW ISOE NYARIKI AKA ANDREW NYARIKI ISOE DEFENDANT

JUDGMENT

1. The plaintiffs filed their Complaint dated 30/03/2022, in their capacity as the Administrators of the Estate of Samwel Kiarie Njuguna a.k.a Samuel Kiarie Njuguna, the deceased herein, seeking General Damages under the *Law Reform Act* and *Fatal Accidents Act*, Special Damages of Kshs. 122,550/-, costs, interests and any other/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 10/10/2021 along Njoro- Nakuru Road at and or near Technology Area for which the parties herein have already recorded a consent judgment on liability at the ratio of 25:75, in favour of the plaintiffs.
3. There is only one issue remaining for my consideration herein. It is the quantum of damages payable herein, if any. Only the plaintiffs' counsel 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 21 years. The death certificates filed on his behalf herein proves that he died on the same day of the accident herein i.e. 10.10.2021, while aged 21 years. He left behind one of the plaintiffs herein, John Njuguna Mutura, as his sole dependant. This is as per the letter from the assistant chief Mwisho wa Lami sub-location which was also filed herein.



The deceased was set to join Rift Valley Institute of Business Studies at the time of his demise. I will thus start with assessing damages under the *Fatal Accidents Act*.

5. I am in agreement with the learned counsel for the plaintiff that the multiplier-multiplicand method is not suitable herein given that the deceased was yet to engage in an economic or income-generating activity. I therefore do agree that the global award approach is appropriate herein (see Daniel Mwangi Kimemi & 2 Others Vrs J G M & Another (the personal representatives of the estate of N K (DCD) [2016] e KLR.).

6. In Peter Kibogoro Wanjohi Vrs Christine Wakuthi Muriuki & Another [200] e KLR, it was observed: -

The deceased was a young girl, who had just joined the university to do Bachelors of Education degree; she had not therefore earned any earning from employment. It is on record that the plaintiff and his counsel rely on the admission to university confirmation letter, and the letter from the teachers' service commission on the earning of a secondary school teacher. But as observed by the defence counsel in her submission, it is not possible for this court, to say for sure when the deceased would have completed her studies, if she would have in fact joined the teaching profession, or moved on to some other greener pastures elsewhere. As such it is not possible for this court, to work out her lost earnings using the formula of a multiplier and multiplicand...

7. Learned counsel for the Plaintiff, has relied on several authorities, notable ones being YH Wholesalers Ltd & Anor. Vrs Joseph Kimani Kamau & Anor [2017] E Klr; Peter Kibogoro Wanjohi Vrs Christine Wakuthi Muriuki & Another, Supra And Fredrick Mwangi Wamwea Vrs Mutuma Munene Meja [2021] e KLR, where the deceased persons died at 21 years and plaintiffs were awarded general damages for loss of dependency of the range of 2,000,000/= to 8,000,000/=. Citing passage of time and inflation since the above awards were made, learned counsel for the plaintiff proposed a conventional/global sum of Kshs. 9,000,000/= as adequate compensation under this head. Learned counsel for the defendant, on the other hand, submitted for a global sum of Kshs. 500,000/=.

8. So as not to complicate myself with the issues of inflation due to passage of time, I have opted to safely go by the latest or recent authority. That is the decision and award in Fredrick Mwangi Wamwea Vrs Mutuma Munene Meja [2021] e KLR, where Kshs. 8,000,000/= was awarded in 2021 in a case where a 21-year-old, 3rd year University of Nairobi engineering student was killed. The learned judge stated as follows:

Following what I have stated above I find the option of an award of a global sum to be more appropriate in the circumstances of this case. Besides the level of joblessness in Kenya I have also considered life preponderables and vicissitudes that can shorten one's life besides the accident and the awards made under the *Law Reform Act*. I find an award of Kshs. 8,000,000/= for lost years to be sufficient in the circumstances of this case.

9. I have no other option, and being bound by the doctrine of judicial precedent and stare decisis, but just to agree with the learned counsel for the plaintiffs' proposal. It is common knowledge that the cost of living has since risen tremendously than the situation that was prevailing in 2021, when the award of Kshs. 8,000,000/- was made. Considering that fact, I do hereby award the plaintiffs Kshs. 9,000,000/- for loss of dependency.

10. Damages under the *Law Reform Act* includes Pain and Suffering and Lost life expectancy. 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 has again cited inflation and the rise in cost of living and has submitted for Kshs. 60,000/= under this head and I thus do therefore agree that Kshs. 60,000/= would suffice as damages for Pain and Suffering.

11. On loss of life expectancy, the deceased herein died at 21 years old. Learned counsel for the Plaintiff has proposed a sum of Kshs 300,000/=. I do agree with the learned counsel herein that a conventional sum is awardable herein. I will still maintain the decision in *Fredrick Mwangi Wamwea Vrs Mutuma Munene Meja*, supra, and considering the rise in cost of living in present times, I do enhance the Kshs. 100,000 awarded therein and do award Kshs. 110,000/= for loss of expectation to life.
12. 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.
13. 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.

14. 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.

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

Under the *Law Reform Act*:

Pain and Suffering: Kshs. 60,000.00

Loss of Expectation of Life: Kshs. 110,000.00

Under the *Fatal Accidents Act*:

Loss of Dependency: Kshs. 9,000,000.00

16. Relying on Justice Kariuki's interpretation hereinabove, I do hereby find that the Kshs. 170,000/= award under the *Law Reform Act*, has been adequately factored in the Kshs. 9,000,000/= award under the *Fatal Accidents Act*. I do therefore find that the plaintiff herein is only entitled to a sum of Kshs. 9,000,000/= as general damages herein.

17. 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.

18. In this regards, Courts have naturally insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. Some receipts were filed herein. They include Kshs. 3,000 bill for mortuary charges from Rift Valley PGH, Kshs. 74,000/- Cash Sale from Abdian Funeral Services being payment for coffin, hearse and flowers; Kshs. 12,000/- receipt from County Government of Nakuru Mortuary, being postmortem charges; Kshs. 70,000/- from J. Ndungu Njuguna & Co. Advocates being the cost of obtaining Ad Litem and an NTSA invoice for Kshs. 550/- being payment for motor vehicle inquiry fee (search). The plaintiff however pleaded a sum of Kshs. 52,000/- only as damages for coffin, hearse, flowers, postmortem and mortuary charges etc. I thus do hereby award him that amount only, notwithstanding the fact that the receipts filed herein amount to a higher amount than the one pleaded. Afterall it is trite that parties are bound by their pleadings and must succeed or fail within the confines of the pleadings. I also award Kshs. 550/- costs of the motor vehicle search and Kshs. 70,000/- costs of obtaining Ad Litem. The plaintiff is therefore awarded special damages pleaded of Kshs.122,550/=.

19. All the awards are subject to the plaintiffs' 25% contribution as consented to herein. Judgment is therefore hereby entered in favour of the plaintiff and against the defendant for Kshs. 9, 122, 550/=, less 25% plaintiff's contribution, which leaves a net of Kshs. 6,841,912/50=; costs and interest.



**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 03RD DAY OF
SEPTEMBER, 2024**

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Kurere h/b Njuguna

Defendant's counsel: Akango

Plaintiffs: n/a

Defendant: n/a

