



Njihia & another (Suing as the Administrators of the Estate of Njehia Gichu) v Rift-Cars Limited & another (Civil Case 725 of 2020) [2024] KEMC 159 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEMC 159 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE 725 OF 2020
PA NDEGE, SPM
NOVEMBER 14, 2024**

BETWEEN

PETER NJIHIA 1ST PLAINTIFF

JULIUS KIHU NJIHIA 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF NJEHIA GICHU

AND

RIFT-CARS LIMITED 1ST DEFENDANT

DANIEL NDEGWA MACHARIA 2ND DEFENDANT

JUDGMENT

1. On or about 03.07.2019, a fatal accident occurred involving the deceased herein, NJEHIA GICHU, and the defendants motor vehicle. The Plaintiffs instituted this suit as the administrators to the estate of the Deceased vide a Plaint dated 24.08.2020 seeking judgment against the defendants, Rift Cars Ltd and Daniel Ndegwa Macharia (hereinafter referred to as the 1st and 2nd Defendants, respectively), jointly for general damages both under the Fatal Accident Act and the *Law Reform Act*, Special Damages of a total sum of Kshs. 663,650/=, Costs of the suit and interests of the sums at court rates. The Defendants were duly served with the summons to enter appearance as well as the Plaint. Only the 2nd Defendant entered appearance vide a Memorandum of Appearance dated 01.02.2022. The 1st Defendant however failed to enter appearance and Judgment in default has accordingly already been entered against it.
2. The matter proceeded for hearing on 11/08/2023. The parties herein however proceeded to record a consent as follows: -
 - a. Judgment be entered for the Plaintiff against the 2nd Defendant on liability at 80:20 in favour of the Plaintiff.



- b. That the Plaintiffs' documents contained in their list of documents dated 24.08.2022 be produced as PEXH. NOS 1 to 12, respectively.
- c. That parties to file and exchange their written submissions on quantum.
3. Thus, the main issue herein is that of quantum. Pursuant to the consent, parties filed and, I do believe, exchanged their written submissions citing various impressive authorities in support of their respective positions. The deceased was proved to have died at the age of 84. He left behind 7 sons, the last one aged 47 years old as at the time of filing the suit herein. The plaintiffs' case is that he was a farmer earning Kshs. 30,000/= per month, 2/3 of which went to the dependants, the grandchildren and other family members for upkeep. The estate further claims Kshs. 17,950/= as his medical expenses, Kshs. 614,000/= being burial expenses, Kshs. 550/= for the motor vehicle search. Kshs. 1,150/= for filing letter of Administration (ad litem) and Kshs. 30,000/= being legal fees on letters of administration. All these must be taken into consideration while arriving at the appropriate awards herein.
4. Under the Fatal Accident Act, the Plaintiff is mainly expected to claim Loss of Dependency. I have gone through the rival submissions filed on the same. In the case of *Mwanzia Vrs Ngalali Mutua Kenya Bus Ltd* and quoted in *Albert Odawa Vrs Gichimu Githenji NKR KCCA NO. 15 OF 2003 [2007]* e KLR, Justice Ringera was of the following view:

The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma.

It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.

5. This reasoning was adopted in *Mary Khayesi Awalo & Anor. Vrs Mwilu Malungu & Anor. ELD HCCC NO. 19 OF 1997 [1999]* e KLR, where Nambuye J., stated that: -

As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.

6. At paragraph 8 of the Plaint, the Deceased is alleged to have been of 84 years old, working as a farmer earning Kshs. 30,000/= per month 2/3 of which went to the dependants, the grandchildren and other family members for their upkeep. The last born was 47 years as at the time of filing this suit. There is however no evidence adduced and/or filed by the Plaintiffs herein to support their claim that the Deceased was a farmer and/or earning about Kshs. 30,000/= per month. No documentary evidence was produced and/or filed on record proving that the Deceased grew and sold any farm produce and the alleged earnings. I do therefore stand guided by the decision of the Court in *Beatrice W. Murage Vrs Consumer Transport Ltd & Anor [2014]* e KLR, where Justice Wendo was of the view that: - 'Ordinarily 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 there is totally no evidence that he earned anything for a living'.
7. I do therefore agree with the learned counsel for the 2nd defendant that 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 herein. The global formulae method is the most appropriate one herein.

8. Further authorities cited by the learned defence counsel such as *John Wamae & 2 Others Vrs Jane Kituku Nziva & Another*, supra, awarded a global sum of Kshs. 400,000/=. The rise in the cost of living and inflation since 2017 when the award was made, can be said to have been taken care of by the fact that the deceased therein was of much younger age than the deceased herein. I do therefore award the sum of Kshs. 400,000/= for loss of dependency
9. Damages under the *Law Reform Act* includes Pain and Suffering and Lost life. From the Death Certificate, PEXH. NO. 5, the deceased herein died on the said day of the accident. Both counsels herein agree 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*. There was however no evidence tendered to prove how long it took him to die on that day, nor the injuries that he sustained. No Post-mortem form was produced as exhibit herein to prove the same. 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 do therefore agree with the learned defence counsel's submissions that Kshs. 10,000/= would suffice as damaged for Pain and Suffering.
10. On loss of life expectancy, the deceased herein died at 84 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 200,000/=, while the learned defence counsel has proposed Kshs. 100,000/=. I do agree with the learned defence counsel that a conventional sum is awardable herein. In *Abson Motors & 2 Others Vrs Sinema Kitsao & Another (administrators Of The Estate Of The Late Kitsao Kajefwa Kitunga (deceased) [2016] e KLR*, the deceased died at the age of 85 years and the High Court upheld an award of 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 hereby agree with the sum proposed by the learned counsel for the plaintiff and enhance the same to Kshs. 200,000/=.
11. There is a debate 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] e KLR*.
12. 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.

13. 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.

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

Under the *Law Reform Act*:

Pain and Suffering: Kshs. 10,000.00

Loss of Expectation of Life: Kshs. 200,000.00

Under the *Fatal Accidents Act*:

Loss of Dependency: Kshs. 400,000.00

15. Relying on Justice Kariuki's interpretation hereinabove, I do hereby find that the Kshs. 210,000/= award under the *Law Reform Act*, has been adequately factored in the Kshs. 400,000/= award under the *Fatal Accidents Act*. I do therefore find that the plaintiffs herein are entitled to a sum of Kshs. 400,000/= as general damages herein.

16. Of all the special damages pleaded, the plaintiff has been able to prove Kshs. 31,700/= only which I hereby assess and award as follows: -

a. Motor Vehicle Search (PEXH NO. 9) Kshs 550.00/=

b. Filing Letters of Administration (ad litem) (PEXH No. 3) Kshs 1150.00/=

c. Legal fees on letters of administration (PEXH NO. 4) Kshs 30,000.00/=

TOTAL ----- KSHS 31,700.00/=

17. All the other special damages claimed such as the funeral expenses were not particularly pleaded as required, while the receipts for medical expense were not clear and the amounts therein therefore remains unproven. All the awards herein are subject to the plaintiffs 20% contribution in liability.

18. Judgment is therefore hereby entered in favour of the plaintiff and against the defendant as follows:

a. General Damages-----Kshs. 400,000/=

b. Special Damages----- Kshs. 31,700.00/=

TOTAL----- KSHS. 431,700.00/=



Less 20%----- Kshs. 86,340.00/=

NET TOTAL----- KSHS. 345,360.00/=

19. The plaintiff also gets the costs and interests at court rates

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 14TH DAY OF
NOVEMBER, 2023**

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

