



Boinet (Suing in the Estate of Derrick Kipkosgei Boinet) v Mburu & another (Civil Case 145 of 2015) [2024] KEHC 1668 (KLR) (Civ) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 145 OF 2015
AN ONGERI, J
FEBRUARY 23, 2024**

BETWEEN

**JEREMIAH KIPTOO BOINET PLAINTIFF
SUING IN THE ESTATE OF DERRICK KIPKOSGEI BOINET**

AND

**MARTIN MAINA MBURU 1ST DEFENDANT
DAVID KIMANI NJUGUNA 2ND DEFENDANT**

JUDGMENT

1. The plaintiff in this case Jeremiah Kiptoo Boinet filed this suit as the personal representative of Derrick Kipkosgei Boinet (deceased) who was involved in an accident on 27/4/2012 along Thika road.
2. The plaintiff in the amended plaint dated 24/2/2021 is seeking general damages under the [Law Reform Act](#) and also under the [Fatal Accidents Act](#). He is also seeking special damages of Ksh.611,504 and costs of the suit and interest.
3. The first defendant filed a defence dated 6/2/2016.
4. PW 1 said in his evidence that he is the father and legal representative of the deceased and he brought the suit on behalf of himself and the siblings of the deceased.
5. PW 1 said the deceased who graduated from the university in 2010 was supporting him.
6. The deceased was not married. He was aged 27 years and was a qualified architecture.



7. The plaintiff engaged the services of a financial consultant (Afueni Business Consultants) who analyzed the bank statements and payment slips of the deceased and said his average earnings was Ksh.189,000 per month.
8. PW 1 adopted his witness statement dated 23/10/2012 as his evidence in chief. He stated that in April 2012 there was an accident along Thika Super Highway on 27/4/2012 where his son Derrick Kipkosgei was involved. He travelled to Nairobi and the first thing he was involved in was to make burial arrangements and other primaries.
9. He stated that the deceased was his fourth born child born on 11/1/1985, who had graduated with a Degree in Architecture from Jomo Kenyatta University of Agriculture and Technology. Upon his graduation the deceased opted to start his private business and formed his company, DEMU Builders Ltd and Drek Studios Ltd.
10. PW 2 David Nyambuti Ndubi who was an eye witness to the accident which occurred on 27/4/2012 said he was a business partner of the deceased.
11. PW 2 produced his witness statement dated 8/3/2015 as his evidence in chief. He stated that he was with the deceased in the ill-fated *matatu*. As they were heading to work from Nairobi. It was raining and near the junction of Githurai along Thika Road a white Toyota L-touring lost control, skidded and hit the left side fender causing it to turn completely and face on-coming traffic. Their driver reduced the speed but unfortunately, they hit the now stationary Toyota L-touring. The driver of the Toyota was injured and they alighted from the *matatu* with bumps and bruises. Together with the deceased they tried to figure a way over the drainage channel as it was considerably deep and wide.
12. A second *matatu* stopped to offer some help when a lorry lost control just like the L-touring. It hit the fender right in front of them and the impact sent them to the wall of the drainage channel. He lost consciousness and when he came to, he sought out the deceased. He realized he couldn't move and sought out the help of a passerby who managed to remove the deceased from the channel. There after they managed to get a *matatu* that ferried them to hospital in Githurai.
13. PW 2 said on the material day he was with the deceased going to Thika for an engagement. He said they were seated at the front of the *matatu* when the vehicle ahead of them stopped.
14. They got out of the vehicle and he wanted to cross the road when they were hit by a lorry and they were both thrown into a ditch.
15. PW 2 said they were taken to a hospital at Githurai where the deceased was pronounced dead.
16. The case initially proceeded *ex parte* and the two witnesses were later re-called for cross examination by the defendant's counsel.
17. PW 1 said in cross examination that the deceased had worked for two years at the time he died.
18. He said the deceased had purchased a vehicle and he was supporting him at the time he died.
19. PW 1 said the deceased operated an account at Barclays bank which showed details of his financial transactions.
20. PW 1 said the deceased owned a company jointly with a friend and also a studio where he did drawings.
21. The defendants did not call any witnesses. The parties filed written submissions as follows;
22. The appellant submitted that the accident was caused by sheer negligence and carelessness on the part of the Defendants, their driver, servants and/or agents and as such the defendants are liable, vicariously



- or otherwise. The Judgement of the Traffic Court in Milimani CMC No. 17319 of 2019 shows the Driver (David Kimani Njuguna) was charged with several counts of causing death by dangerous driving and on the 5/12/2019 Hon. E. Riany found him to blame for causing the accident for driving at a speed he could not manage and failing to look out for other road users. She returned a verdict of guilty as charged and sentenced him on the 17/12/2019 to a fine of Kshs.100.000 per count and in default 2 years in Jail.
23. The plaintiff argued that the defence is seeks to shift blame to third parties who are not parties to the case herein. The defence admits ownership of the lorry that is collaborated by the certificate of search. Further, a copy of the Police Abstract dated 30/4/2012, Lorry KAA 273P was blamed for the accident. It is hence clear from the Plaintiff's testimonies and their written statements that the driver of the subject vehicle must have been carelessly and recklessly driving in the circumstances that explain why he was unable to control, slow down, brake and/or bring the said vehicle into a halt and avoid the subject accident. The said driver took off from the scene of the accident and it only took the intervention of the police to arrest him after being on the run for more than six (6) months after the ill-fated accident.
24. On the damages the plaintiff proposed a sum of Kshs. 100,000- 150,000 would be sufficient for pain and suffering. The deceased died after the accident at St. Johns Hospital while undergoing treatment. In support the plaintiff cited *Benedeta Wanjiku Kimani vs Changwon Cheboi & Another* [2013] eKLR, where the case of *Beatrice Wangui Thairu vs. Hon. Ezekiel Barng'etuny & Another* (Nairobi) HCCC No. 1438 of 1998 (Unreported) was cited, and referred to in *Rev. Fr. Leonard O. Ekisa & Another vs. Major Birgen* [2005] eKLR, Ringera J said *inter alia* –
- “... there is no rule of law that two-thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case ..”
- “In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in a lump sum (*Hannah Wangaturi Moche & Another vs. Nelson Muya* (Nairobi HC No. 4533/1993).”
25. On loss of expectation of life the plaintiff proposed a sum of Kshs. 57,577,600. The deceased was aged 27 years at the time of his death. He had completed his studies, was self-employed as a professional architect and had registered his Company (Demu Builders Limited, Drex Studios in his name and was heading to meet the management of Kenya Vehicle Manufacturers (KVM) for a business venture they were undertaking together in the company of PW 2 when he met his death.
26. On loss of dependency/Lost year the plaintiff submitted that based on a retirement age of 60 years and taking into account his last monthly earnings, damages payable would translate to the sum of Kshs. 65, 153,600/= . The deceased died at the age of 27 years, his net pay at the time of his death was Kshs. 189,400/-.
27. The plaintiff submitted that estate of the deceased is entitled to compensation as he was survived by his father and siblings. He was supporting his father their mother having passed on while they were young. He was in good health and had very bright prospects for the period he had worked before his untimely death.
28. On special damages the plaintiff submitted that the plaintiff urged the court to award Kshs. 628,689. The fees contain a breakdown of filing the plaint, funeral expenses incurred by the Estate in funeral preparations and obtaining records from the Government.



29. The defendant alternatively submitted that as unfortunate as the demise of the deceased is; he and the PW-2 are partly to blame for the death. That the doctrine of volenti non fit injuria should be invoked. This is due to the fact that despite having been involved in an accident prior to the subject accident; the deceased and his friend; PW-2 stayed at the scene and made no effort to be at a safe distance.
30. The defendant submitted it was an indisputable fact that the weather that morning was not conducive which is confirmed by the fact that the accident was mainly caused by the fact that another accident had occurred on the same spot and hadn't been cleared. Perhaps the result would have been different if the initial accident scene had been secured and cleared in good time.
31. The defendant submitted that it cannot be discerned what the deceased did for a living. The defendants argued that the plaintiff misled the court by asserting that the deceased was not employed and implied that the deceased operated as an independent contractor. That it is instructive to note that despite the fact that the Plaintiff insists that the deceased made a living through the Companies known as DEMU Builders Limited, Drek Studios and another one whose name isn't provided; he never produced any evidence of payment made to these companies. In fact, the bank statements being relied on are in the name of the deceased for the period of 1/1/2011 to 8/8/2011. This leads to very serious doubts as to whether the deceased actually derived an income from the aforesaid companies.
32. I have considered the evidence adduced by the plaintiff in this case.
33. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
34. The issues for determination in this case are as follows;
 - i. Whether the plaintiff has proved his case to the required standard.
 - ii. Whether the defendants are liable to pay the plaintiff the damages he is seeking against them.
35. On the issue as to whether the plaintiff proved his case to the required standard, I find that the plaintiff's evidence was not controverted since the defendants did not call any witnesses.
36. I find that PW 2 was an eye witness to the accident. He said they were hit by the motor vehicle registration no. KAA 273P and as a result the deceased sustained fatal injuries.
37. PW 2 said on the material day he was with the deceased going to Thika for an engagement. He said they were seated at the front of the matatu when the vehicle ahead of them stopped.
38. They got out of the vehicle and he wanted to cross the road when they were hit by a lorry and they were both thrown into a ditch.
39. PW 2 said they were taken to a hospital at Githurai where the deceased was pronounced dead.
40. The Defendants did not adduce any evidence to controvert the testimony of PW2.
41. I find that the driver of motor vehicle registration no. KAA 273P was entirely to blame for the accident and I hold the defendants 100% liable in negligence.
42. On the issue as to whether the defendants are liable to pay the plaintiff the damages he is seeking against them, I find that the plaintiff who is Administrator of the estate of the deceased is entitled to be compensated.
43. On general damages for pain and suffering, I find that after the accident, the deceased was taken to a hospital at Githurai where he was pronounced dead on arrival.



44. I award general damages of Ksh.10,000 in respect of pain and suffering.
45. On the issue of loss of expectation of life, I award a global figure of Kshs.100,000.
46. I rely on the case of *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, the court observed:
- “The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
47. On the issue of loss of expectation of life/loss of Dependency, the deceased was aged 27 years at the time of his death. He had completed his studies, was self-employed as a professional architect and had registered his Company (Demu Builders Limited, Drex Studios in his name and was heading to meet the management of Kenya Vehicle Manufacturers (KVM) for a business venture they were undertaking together in the company of PW 2 when he met his death.
48. The plaintiff submitted that based on a retirement age of 60 years and taking into account the deceased’s last monthly earnings, damages payable would translate to the sum of Kshs. 65, 153,600/=. The deceased died at the age of 27 years, his net pay at the time of his death was Kshs. 189,400/-.
49. There is evidence that the deceased operated an account at Barclays Bank which showed details of his financial transactions.
50. PW 1 said the deceased owned a company jointly with a friend and also a studio where he did drawings.
51. I find that the defendants did not rebut the evidence of the plaintiffs on the loss of future income in respect of deceased.
52. In the case of *Rev. Father Leonard O. Ekisa & another v Major Birgen* [2005] eKLR where Ringera J held as follows on the issue of determining the multiplier in cases of loss of future income;
- “In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependancy, the vicissitudes of life and factor accelerated by payment in lump sum (*Hannah Wangaturi Moche & Another v Nelson Muya* HCC 4533/93).”
53. There is no dispute that the deceased was a qualified architecture earning an average of Ksh.189,400 per month.
54. The deceased would have worked for 33 years before retirement at the age of 60. I have considered the vagaries of life and I award a multiplicand of Kshs. 100,000 and a multiplier of 33 years.
55. I accordingly award damages as follows;
- General damages for pain & suffering Ksh.10,000
- General for loss of expectation of life Ksh.100,000
- General damages for loss of
- Dependency $100,000 \times 12 \times 33 \times \frac{2}{3}$ Ksh.26,400,000
- Special damages Ksh.628,689



Total Ksh.27,138,689

56. Judgment be and is hereby entered in favor of the plaintiff against the defendants jointly and severally in the sum of Ksh.27,138,689 together with costs of the suit and interest at court rates from the date of this judgment until payment in full.

57. Interest in respect of special damages is from the date of filing this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

