



Mutava & Maweu (Suing as Administrators ad litem of the Estate of Peter Muithya Maweu) & 2 others (Suing as Administrators Ad Litem of the Estate of Francis Kioko Mutuku) v Mombasa Highway Transport Company Limited & another (Civil Suit 160 of 2010) [2023] KEHC 4080 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 4080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 160 OF 2010**

MW MUIGAI, J

APRIL 28, 2023

BETWEEN

TERESIA NDILA MUTAVA & JANUARIS KYALO MAWEU (SUING AS ADMINISTRATORS AD LITEM OF THE ESTATE OF PETER MUTHYA MAWEU) 1ST PLAINTIFF
TERESIA MWIKALI NDOLO 2ND PLAINTIFF
JOSEPHAT WAMBUA MUTUKU 3RD PLAINTIFF
SUING AS ADMINISTRATORS AD LITEM OF THE ESTATE OF FRANCIS KIOKO MUTUKU

AND

MOMBASA HIGHWAY TRANSPORT COMPANY LIMITED .. 1ST DEFENDANT
RAJAB MGERA 2ND DEFENDANT

JUDGMENT

1. The suit was commenced by the Plaintiffs by way of a Plaint filed on 3rd August 2010 and amended on June 24, 2011. The matter concerns compensation for two families of two victims of a fatal accident which occurred on 9th February 2008 along Njoro- Elburgon road. The two deceased persons were passengers in the accident motor vehicle, being KAJ 081 ZB 6869 which veered off the road resulting to the fatal accident.
2. The wife and brother to the late Peter Muithya Maweu sued as the 1st and 2nd Plaintiff respectively whereas the wife and brother to the late Francis Kioko Mutuku sued as the 3rd and 4th Plaintiff



respectively. They sued the owner and driver of the subject motor vehicle and blamed the 2nd Defendant for causing the death of the two persons through his negligence.

3. The Plaintiffs sought the following prayers;
 - a. Special damages of Kshs. 46,385 for Peter Muithya Maweu and Ksh.39, 605 for Francis Kioko Mutuku.
 - b. General damages for pain and suffering
 - c. General damages for loss of expectation of life
 - d. General damages for loss of dependency
 - e. General damages for loss of earnings
 - f. Costs of this suit
 - g. Interest on a), b), c), e) and f) at court rates
 - h. Any other relief that the court may deem fit
4. As per the record, default Judgment was entered in favour of the Plaintiffs on 22nd October 2010 but the 1st Defendant filed an Application to set aside the default judgment on 3rd December 2010. The Application was allowed and the 1st Defendant opposed the suit.
5. The 1st Defendant filed their statement of defence dated 3rd December 2010. They denied the allegations in the Complaint and claimed that they had not authorized the carriage of any passenger in the subject motor vehicle as it was a commercial vehicle and the passengers ought to have known that the drivers in practice get a contract with the owners of which terms include but not limited to, who is liable for road risks and goods to be carried. Further, they denied that the accident was as a result of the driver and blamed the same on an act of God. They further denied the jurisdiction of the court as they are based in Mombasa.
6. The Plaintiff consequently filed an Application dated 24th June 2011 seeking to amend the Complaint and include the 2nd Defendant, Application of which was consequently allowed, resulting to the adoption of amended Complaint dated 24th June 2011 and including the 2nd Defendant which was filed and was allowed.
7. The suit was further dismissed on 2nd February 2022 for non-compliance and reinstated vide an Application dated 15th February 2022 filed by the Plaintiffs, citing the challenge on the moratorium which had put on hold litigation touching on the insurer of the said motor vehicle.

Evidence By The Parties

The Plaintiffs' Case

4. The Court record confirms that Interlocutory judgment was entered on 22/10/2010 against Mombasa Highway Transport Company Limited, the Defendant herein having been served with Summons to enter Appearance/Defense within the prescribed period.
5. On 7/7/2022, Counsel for the Plaintiff confirmed that they served the Defendant through their advocates on record and filed Affidavit of Service on 4/7/2022 and Pre-trial Documents were filed.
6. The Matter then proceed to formal proof virtually on 20th September 2022. PW1, was the 1st Plaintiff, Teresia Ndila Mutava who testified on her own behalf and on behalf of the 2nd, 3rd and 4th Plaintiffs. She



adopted her statement dated April 22, 2022. She stated that she was the wife to the late Peter Maithya Maweu and had brought the suit on her own behalf and on behalf of the other dependants. She stated that the deceased Francis Kioko and Peter Maweu were lawfully travelling in the motor vehicle registration number KAJ 018 (ZB 6869) and that the 2nd Defendant, being an authorized servant of the 1st Defendant, drove or controlled the said motor vehicle in a reckless, careless or negligent manner causing the said motor vehicle to lose control thereby occasioning fatal multiple injuries to the deceased.

7. The witness further testified that she had three children of which two were almost joining college and one a student at the secondary school level. She also testified that the 3rd Plaintiff had three children who were at the primary school level. She stated that life had become hard for them after the demise of their spouses and the children had to drop out of school. She also pleaded that they incurred expenses at the hospital and the mortuary of which she produced receipts thereof and prayed for special damages as per the Plaintiff.
8. She also did produce several documents to support their case, including payments receipts to the hospital and funeral homes, death certificates for the two deceased persons, vehicle search certificate, police abstracts, letters from the office of the chief, grant of letters of administration for the estates of the two deceased persons, demand notices and statutory notice to the Claims Manager at BlueShield Insurance Co Ltd. The documents are in the Index to Plaintiffs list of Documents filed on 29/10/2012 that lists 28 documents.
9. She further stated that the deceased persons were businessmen at a tender age of 31 and 32 years and in good vibrant health and who supported their families by way of food, clothing, school fees, affection and companionship. She stated that the 4 Plaintiffs had suffered loss and damage due to the accident.

Submissions By The Plaintiff

12. Counsel for the Plaintiffs filed submissions in support of their case. They framed two issues for determination by the court;
 - a. Whether the Defendants are jointly liable for the accident which occurred on February 9, 2008 leading to the death of the deceased persons.
 - b. Whether the estates of the two deceased persons are entitled to damages and the reliefs sought in the amended Plaintiff, costs and interests thereon.

Liability

8. On whether the defendants were jointly and severely liable for the accident, they submitted that the deceased persons were injured and died as a result of the accident, Francis Kioko Mutuku & Peter Muithya Maweu were lawfully travelling as passengers in the said vehicle that was involved in an accident which was caused by the negligent and careless manner that the 2nd Defendant drove and managed the vehicle. It was their contention that the 1st Defendant was vicariously liable for the acts and omissions of the 2nd Defendant causing the fatal accident.
9. It was the Plaintiffs' contention that the Police Abstract of 23/6/2008 confirms the road accident of 9/2/2008 at 7.30 pm along Elburgon-Njoro road in motor vehicle Reg KAJ 0181ZB6869 Nissan Trailer and the copy of the Motor Vehicle records/KRA/Road Transport Department indicate the registered owner as Mombasa Highway Transport Co Ltd. confirm that the accident occurred and that the 1st Defendant was the owner of the subject motor vehicle. It was hence their submission that the 1st and 2nd Defendants were both 100% liable for causing the deaths of the two deceased persons.



Quantum

Special Damages;

10. On whether the estate of the deceased persons are entitled to the reliefs and damages sought on the amended Plaintiff, they relied on the details of the special damages as proved by means of the receipts at KSh. 46,385 for the 1st and 2nd Plaintiffs and Ksh. 39,605 for the 3rd and 4th Plaintiffs.

General damages

11. On the general damages for pain, suffering and loss of expectation for life, they cited with approval the case of Sukari industries Limited vs Clyde Machimbo Juma; Homabay HCCA No.68 of 2015; where the courts held that an award of Ksh. 10,000-100,000 under this head was reasonable. The Plaintiffs submitted that the deceased suffered excruciating pain before their demise while undergoing treatment at the Molo District Hospital pain and that an award of Ksh. 100,000 for each of the deceased persons under this head would be reasonable.

Loss of Dependency

12. For loss of dependency, they reiterated that the deceased persons were bread winners for their families and that they left children ranging from primary school, secondary and college for the respective Plaintiffs. They opined that the global sum method when applied as opposed to the multiplier method since the deceased are stated to have operated in the business world hence their wages was not ascertainable. They opined that a global sum of KSh. 1,750,000 for each of the deceased persons would be reasonable, citing the case of *Raton Mwirigi Ndege & another versus Paul Kirimi Kithinji* HCCA No.72 of 2017 where the court awarded Ksh. 1,500,000 for similar circumstances, following the award in *David Magondi Senema & another vs Joseph Saboo & another* 2019 eKLR where the court awarded a global sum of Ksh. 1,200,000 for yet again very similar circumstances. The Plaintiffs opined that an award of Ksh.1, 750,000 would suffice in the present case, putting into consideration inflation and lapse of time since the aforementioned cases were decided.
13. In conclusion, the Plaintiffs prayed for a total of Ksh. 1,996,385/= for the 1st and 2nd Plaintiffs and Ksh. 1, 989, 605/= for the 3rd and 4th Plaintiffs.
14. Despite the evidence of service on record, the Defendants did not attend court to adduce any evidence nor file any submissions to support their case.

Analysis and Determination

15. I have considered the Pleadings by the parties and the evidence presented to this court. The issues that this court needs to determine are two-fold;
 - a. Whether the Plaintiffs have proved their case on a balance of probability
 - b. The quantum, if any, of damages payable.

Liability

16. On whether the Plaintiffs have proved their case on a balance of probability, my comprehension is as defined in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLE 526 as follows:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took



place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

17. In the instant suit, the Plaintiffs claim that the Defendants are jointly and severally liable for the deaths of the two deceased persons. They did produce documentary evidence of the death of the two victims and the ownership of the motor vehicle that caused the accident. These are Death Certificate and Police Abstract. The death of the two persons is not disputed, neither is the fact that they died as a result of the accident that occurred on February 9, 2008. It has also not been disputed that the 2nd Defendant was the driver of the subject motor vehicle at the time of the accident, vested with the responsibility of controlling and or managing the same. It is also uncontested that the 1st Defendant is the duly registered owner of the subject motor vehicle.
18. The 2nd defendant did not enter appearance nor defend the matter to counter any allegations by the Plaintiff. The 1st defendant, though it entered appearance did not attend court to produce any evidence in support of their defence and their statements remain mere rumors. The testimony of the 1st Plaintiff, being uncontroverted, can then only be adopted as a true record of account of the events that transpired and on reliance of the list of documents produced.
19. Notably, the 2nd Defendant failed to tender evidence to prove that the deceased persons were unlawfully ferried on the subject motor vehicle as passengers. Nevertheless, it is also expected that the driver ought to have taken due care in his management of the said motor vehicle. In *Masembe v Sugar Corporation and another* [2002] 2 EA 434, it was held that:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.”
20. In *Janet Kaphiphe Ouma & another vs. Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”
21. In view of this, the court finds that the 2nd Defendant is liable for negligence whereas the 1st Defendant is vicariously liable for allowing the 2nd Defendant to drive the said motor vehicle as such.

Quantum of Damages

22. On the quantum of damages payable, this court will proceed to make its pronouncement on the quantum payable under the following heads;
 - a. Pain and Suffering



- b. Loss of expectation of life
- c. Loss of dependency
- d. Special damages

Pain and Suffering

23. On this heading, the court notes that the deceased persons were first taken to Njoro district hospital and passed on while receiving treatment. This court associates with the holding in *Sukari Industries Limited v Clyde Machimbo Juma* Homa Bay HCCA No. 38 of 2015 [2016] eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs.50,000/- for pain and suffering, Majanja J. held that:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs.10,000/- to Kshs.100,000/- over the last 20 years hence I cannot say that that the sum of Kshs.50,000/- awarded under the head is unreasonable.”

24. Consequently, this court holds the view that an award of KSh. 50,000 for each deceased person is reasonable enough, putting into consideration the pain they are likely to have undergone and the fact that the victims passed on 9th February 2008, a day after the accident occurred.

Loss of expectation of life

25. On this head, the court is cognizant of the fact that the deceased persons died at a tender age of 31 and 32 years respectively years and that their death was as a result of the subject accident, as per the evidence adduced. Consequently, the court associates with the decision in *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR where the court observed that:-

“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 Kshs. 100,000/-“

Consequently, the court finds an award of KSh. 100,000 for each of the deceased persons reasonable.

Loss of dependency

26. PW1 did testify that the deceased person provided basic needs for their dependents and that their children were still of school-going age but had dropped out after the demise of the two Plaintiffs. It was also their testimony that the Plaintiffs were young businessmen and in good health. However, no evidence was adduced to prove their earnings from their businesses. This court associates with the



finding of the court in *Gordon Ouma Sunda & Another v Adan Abdikadir Omar & Another* [2019] eKLR, where the court stated as follows:

“Appreciably, it is reasonable to expect that as an African man, the deceased financially supported his wife and three children. This court finds and holds that it was also reasonable to have expected that deceased would have to spend a large chunk of his income on his dependents...”

27. The Court in *Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another* [2020] eKLR awarded a global sum of Ksh . 1,000,000 for a 23 year old victim of fatal accident. The court awarded Ksh, 2,000,000/= for a 42year old and held inter alia;

“Taking into consideration the fact that the deceased was married and had 2 young children aged 6 and 4 years at the time PW2 testified in the lower court, the length of dependency on the deceased by his wife who was 29 years old and young the children would have been for very many years. I therefore find that the Trial Court’s award of Kshs. 2,000,000/= for loss of dependency was not inordinately high hence the appeal fails on this ground.”

28. In the instant suit, the Plaintiffs have argued that the deceased were businessmen who earned and supported their families from their businesses. This has not been disputed. There is however, no evidence tabled that shows how much the deceased made from their alleged businesses. Consequently, this court associates with the finding in the same breath, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, held as follows-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

29. Based on the circumstances of the case including the age that the deceased persons had attained, the status of their dependents, inflation and the likely impact of the death of the deceased on their families, this court is of the view that an award of Ksh. 1,300,000/- under this head for each deceased person would be reasonable.

Special damages

30. The Plaintiffs have prayed for a sum of Ksh. 46,385 for the 1st and 2nd Plaintiff and produced receipts as follows;

Hospital and medical expenses.....Ksh.5,550

Funeral expenses.....Ksh.38,000

Police abstract.....Ksh.100

Letters of administration.....Ksh. 2,735

Total.....Ksh.46,385

31. The Plaintiffs have prayed for a sum of Ksh. 39,605/= for the 3rd and 4th Plaintiff and produced receipts as follows;



Hospital and medical expenses..... Ksh.1450
Funeral expenses..... Ksh.35,320
Police abstract..... Ksh.100
Letters of administration.....Ksh. 2,735
Total..... Ksh.39,605

32. In summary, the Court awards the following damages to the Plaintiffs

To the 1st and 2nd Plaintiffs for Peter Muithya Maweu
General damages for pain & suffering.....Ksh. 50,000/-
General damages for loss of
expectation of life..... Ksh...100,000/-
General damages for loss of
dependency..... Ksh. 1,300,000/-
Special damages.....Ksh.46,385/=
Total.....Ksh.1,496,385/-

To the 3rd and 4th Plaintiffs for Francis Kioko Mutuku
General damages for pain and suffering...Ksh.50,000/-
General damages for loss of
Expectation of life..... Ksh.100,000/-
General damages for loss
of dependency..... Kshs. 1,300,000/-
Special damages.....Kshs. 39,605/-
TotalKshs.1,489,605

33. The Plaintiffs shall have the cost of the suit

34. Interest at court's rate from date of judgment.

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 28TH DAY OF APRIL, 2023
(VIRTUAL/PHYSICAL CONFERENCE).**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF

Mr. Kimeu H/b Ms Kilonzo - for the Plaintiffs

No appearance - For the Defendants

Geoffrey - Court Assistant

