



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 222 OF 2012

WINNE WAMBUI KIBINGE.....1ST PLAINTIFF

ERNEST NJENGA KIBINGE.....2ND PLAINTIFF

FRANCIS KAHINDI KIBINGE.....3RD PLAINTIFF

(Suing as legal representatives of **ISIAH NGEI KIBINGE** Deceased)

VERSUS

MATCH ELECTRICAL LIMITED.....DEFENDANT

JOHN THUO GITAU (T/A MAIMBA BREAKDOWN &

CRANE SERVICES).....THIRD PARTY/RESPONDENT

JUDGMENT

1. By a plaint dated 30th April, 2012 the Plaintiffs instituted this suit as the personal representatives of the deceased, Isaiah Ngei Kibinge. The claim is for general damages against the Defendant under the Fatal Accidents Act and the Law Reform Act, special damages and costs.
2. The Plaintiffs' claim is that the deceased was fatally injured on 4th November, 2010 when his motor vehicle registration No. KSF 884 that he was driving at Wangige Market was hit by a 30 meter floodlight mast which was being hoisted by the Defendant's servants or agents.
3. The claim is denied as per the Amended Defence dated 13th December, 2012. It was stated that the accident was wholly caused or substantially contributed to by the deceased. The Defendant further stated that the accident was caused by the negligence of Breakdown and Crane Services and a Third Party Notice was subsequently issued to John Thuo Gitau trading as Maimba Breakdown and Crane Services who came on board as the Third Party.
4. The Plaintiff's filed a reply to the Amended Defence, denied the contents thereof and reiterated the contents of the plaint.
5. The Third Party filed a Defence to the Third Party Notice and plaint and denied the claims. In the alternative, the Third Party blamed the accident on the Defendant.
6. The Plaintiff's side called five witnesses. PW2 George Mburu Egei whose evidence is that he was an employee of the deceased at the deceased's gas supply business testified that he was with the deceased at the material time. His evidence is that it was a market day and they were going to deliver gas to customers. That while passing through Wangige Market the mast fell on the motor vehicle of the deceased with a bang. That he fell unconscious and came to while in hospital.
7. PW3 Muthiani Musewa and PW4 David Mwathi Mwaura stated that they were traders at Wangige Market. They testified that they witnessed the mast which was being hoisted fall off the crane and hit the pickup that was being driven by the deceased.
8. On the Defendant's side, six witnesses testified. DW1 Jackson Wanjohi Mukunya, a supervisor employed by the Defendant gave evidence that he informed the traders at the market to move away from the area where the mast was being erected. That they complied and he

condoned the area with a ribbon. That they then blocked the roads from both sides by parking two trucks across each of the roads. That no motor vehicles were using the road and the crane operator started hoisting the mast but the mast snapped from the hooks of the crane and the mast fell on one person and on a pickup motor vehicle which had two occupants. He blamed the motor vehicle for failing to stop.

9. DW2 Lawrence Kinuthia, DW3 Patrick Kimani Wainaina, DW4 Kennedy Njoroge, DW5 Norman Macharia and DW6 Christopher Maina Theuri gave a similar account of evidence as DW1 regarding the accident. DW3 Patrick Kimani Wainaina who testified that he was employed by the Respondent as a driver testified that he used his motor vehicle registration KAV 481J to block the road from Maimuto to Wangige side.

10. The Third party called one witness, John Thuo Gitau. His evidence is that he was the owner of the Breakdown and Crane Services sued as the Third Party herein and had been subcontracted by the Defendant's Company to hoist a 30 meter security light mast at Wangige Market. That the Third Party's work was to hoist the mast and the Defendant was to install the same. That the Defendant's employees were to clear people from the scene which was done. That while he was operating the crane and started lifting the mast he heard a bang and on checking found the mast had broken down and had fallen on a motor vehicle. That the motor vehicle was inside the condoned area while no other motor vehicles were in the area as the road had been blocked. That the injured people were rushed to hospital and police officers came to the scene.

11. At the close of the case, written submissions were filed and I have considered the same.

12. It is common ground that the accident occurred at the scene while the mast was being hoisted. The bone of contention is whether it was the deceased who was to blame or the Defendant and/or the Third Party. It is also evident from the evidence from all the parties herein that it was a market day and there were many people at the scene including onlookers.

13. The evidence from the Plaintiffs' side blames the accident on the falling of the mast on the motor vehicle which was on the road. According to DW1 George Mburu Egei the road where the accident occurred was being used by motor vehicles as usual and that there were no police officer at the scene. DW3 also took the stand that the operations at the crowded market were going on as usual with no police officers and that the road was not closed. PW4 a trader at the market also took a similar position.

14. On the other hand the position taken by the Defendant's witnesses reflects that people were cleared from the scene which was then condoned off with a ribbon with the presence of two motor vehicle complete with flags blocking either side of the road from the market. Although the Plaintiff's side has categorically stated that the road was being used as usual, it is evident from the description of the scene there were many people milling around the area. This court finds that it was not business as usual at the market and anybody approaching the scene needed to take extra precautions.

15. The absence of police officers to control the crowds and failure to properly condone the area and completely block the roads reflects negligence on both the Defendants and Third Party's side. While a properly joined and fastened mast would ordinarily not slip or break and fall, if the scene had been properly sealed off the accident could have been averted. I would apportion liability at 20% against the Plaintiff and 40% each against the Defendant and the Third Party respectively.

16. PW1 Earnest Njenga Kibinge a son to the deceased testified was that he is the 2nd Plaintiff herein while the 1st and 3rd Plaintiffs are his mother and brother respectively. His evidence is that the deceased was rushed to a nearby Sub-District Hospital then transferred to Avenue Nursing Home and later to Kenyatta National Hospital. That the deceased was conscious during the hospitalization and succumbed to the injuries on 9th November, 2010. The date of death and age of the deceased is given as 64 years in the Death Certificate produced herein. The deceased must have experienced pain and suffering for the period of 5 days from the date of the accident to the date of death.

17. The Plaintiff's advocate submitted for an award of Ksh.300,000/= for pain and suffering and Ksh.150,000/= for loss of expectation of life. The Defendant's Advocate submitted for an award of Ksh.10,000/= for pain and suffering and Ksh,100,000/= for loss of expectation of life. The Third Party submitted for an award of Ksh.50,000/= for pain and suffering and Ksh.80,000/= for loss of expectation of life.

18. Taking into account the authorities cited herein and further taking into account comparable awards, I award Ksh.50,000/= for pain and suffering and Ksh.100,000/= for loss of expectation of life.

19. The deceased was described by the Plaintiffs' witnesses as a businessman. PW1 gave the deceased's earnings as Ksh.128,942/= per month. Although the deceased was described as having been trading in cooking gas supply business, what PW1 described as a reconstructed financial statement for year 2009/2010 and a projected business mark-up of 30% to get the profits, the documents produced are not reliable as they do not cover all the aspects of the profit and loss for the business.

20. PW1 during cross-examination admitted that he did not have all the receipts for the business and that he had no receipt for the payment for rent or power bills. He conceded that he did not know how much the deceased paid the two workers at his business. No license was produced for the business or any Bank Statements or Kenya Revenue Authority Returns. Indeed PW1 conceded that the documents available in respect of the sales were scanty. The reconstructed accounts are therefore not based on complete accounts and are unreliable. In the circumstances, I award the Minimum Labour Wages for the year 2010 which is Ksh.8,400/= for a shop-worker in the municipalities. This amount excludes house allowance. Consequently, I round up the same to Ksh.10,000/= per month.

21. PW1's uncontroverted evidence is that the deceased was married with four children. His further evidence was that the deceased provided for his wife who was a housewife and for the young children and paid fees for the last born who was still in college. The deceased must have also used some of his income on himself. At 64 years of age the deceased could have continued working for more years as he was in the private sector in his own business. I however take into account that the award herein is in a lump sum. The imponderables of life have also to be taken into account. I adopt a multiplier of 5 years and a 2/3 ratio. The totals comes to $Ksh.10,000 \times 12 \times 5 \times \frac{2}{3} = Ksh.400,000/=$.

22. The hospital expenses claimed is Ksh.86,358/=. The receipts produced are for Ksh.57,783.50 from Avenue Health Care and receipt for Ksh.11,426/= from Kenyatta National Hospital. The total comes to Ksh.69,209.50. I award the same.

23. Ksh.82,000/= has been claimed as funeral expenses. The following receipts were produced as exhibits:

- Receipt from the funeral home Ksh.15,000/=
- Receipt for the coffin Ksh.15,000/=
- Receipt from the pathologist Ksh.10,000/=
- Receipts for radio death and funeral

Announcements for Ksh.2190 x 4 = Ksh.8,784/=

- Receipt for newspaper obituary Ksh.18,275/=

Total **Ksh.67,059/=**

24. The claim for Ksh.200,000/= for miscellaneous funeral expenses is not supported by any documents. However, some expenses must have been incurred by the family. An award of Ksh.20,000/= is reasonable in the circumstances.

25. The claim for loss of the motor vehicle is for Ksh.300,000/=. However, the Motor Vehicle Assessment Report produced reflects the pre-accident value of the motor vehicle as Ksh.235,000/= and the salvage value as Ksh.40,000/=. The evidence of PW1 is that the widow of the deceased sold the wreckage of the motor vehicle but he did not know how much it fetched. Ksh.235,000/= less the salvage value comes to Ksh.195,000/= which is awarded.

26. The Ksh.6,500/= claimed for towing charges have been proved as per the receipts produced for Ksh.5,000/= and Ksh.1,500/= from the Towing and Recovery Services.

27. The total special damages award is as follows:

- Hospital expenses Ksh.69,209.50
- Funeral expenses Ksh.67,059.00
- Miscellaneous funeral expenses Ksh.20,000.00
- Loss of motor vehicle Ksh.195,000.00
- Motor vehicle towing charges Ksh.6,500.00

Total **Ksh.357,768.50**

28. The total award is as follows:

- a. Pain and suffering Ksh.50,000.00
- b. Loss of expectation of life Ksh.100,000.00
- c. Loss of dependency Ksh.400,000.00
- d. Special damages Ksh.357,768.50

Total **Ksh.907,768.50**

Less 20% contribution Ksh.181,553.70

Ksh.726,214.80

29. Subject to apportionment of liability at 40% against the Defendant and 40% against the 3rd Party, I enter judgment for the Plaintiffs against the Defendant and the Third Party for the sum of Ksh.726,214.80/= costs and interest.

Date, signed and delivered at Nairobi this 21st day of January 2021

B. THURANIRA JADEN

JUDGE