



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL SUIT NO. 84 OF 2004**

**REGINA CHELIMO MAGUT.....1<sup>ST</sup> PLAINTIFF**

**PAUL KIPTUM MAGUT.....2<sup>ND</sup> PLAINTIFF**

**(Both suing as the administrators of the estate of CLEMENT KIPKORIR MAGUT (DECEASED))**

**VERSUS**

**LINEAR COACH LIMITED.....DEFENDANT**

**JUDGMENT**

1. This claim arose out of a road traffic accident which occurred on 3<sup>rd</sup> September 2003, involving motor vehicle registration mark and number KAK 101M, to be referred to as the accident vehicle, in which Clement Kipkorir Magut, the deceased person herein, was travelling as a fare paying passenger, and as a result of which he met his death. The accident vehicle was alleged to have been owned by the defendant at the material time. The plaintiffs are the administrators of the estate of the deceased. They attribute the occurrence of the accident on negligence on the part of the driver of the accident vehicle, Kennedy Nyangate Nyandiri, particulars of which were itemized in the plaint.

2. The claim is founded on both the Law Reform Act, Cap 26, Laws of Kenya, and the Fatal Accidents Act, Cap 32, Laws of Kenya. It is pleaded that the deceased was 45 years of age at the time of his death, and was a businessman, whose annual gross income averaged Kshs. 900, 000.00, from which he supported a family of one wife and four children. He was said to have been of good health and was expected to have continued to actively work up to the age of 70. The plaintiffs claimed general damages under the two statutes as well as costs and interests.

3. In its defence, the defendant denied liability and the allegations of negligence. In the alternative, it was pleaded that the accident was occasioned by factors beyond the control of the driver, particulars of which are set out in the statement of defence. .

4. PW1, Police Sergeant Gerishon Opiyo, No. 42432, was the first witness for the plaintiffs. He was attached at the Serem Police Station at the time he testified, and came to produce the police records relating to the subject accident. He stated that according to the records the vehicle, a bus, belonged to the defendant and the accident was self-involving. The police visited the scene of the accident and ascertained that there were passengers who suffered fatal injuries, among them being the deceased herein. Upon finalization of investigations, the police recommended prosecution of the bus driver. The police recorded statements of witnesses, and he named them. A sketch of the accident scene was also drawn. It indicated that the vehicle was on the Kapsabet-Chavakali Road heading in the direction of Chavakali. It veered off the road and overturned on the right side of the road facing Chavakali, which, he opined, was an indication that it was being driven at high speed.

5. PW2, Paul Kiptum Magut, testified on 13<sup>th</sup> October 2008. He was a brother of the deceased and one of the administrators of his estate. He testified that the deceased was a passenger in the accident vehicle. His mobile phone was found at the scene and it was what was used to contact his relatives. He visited the Vihiga Hospital where the deceased had been rushed and found that he had died. He was party to his funeral arrangements. they hired a vehicle to transport the body to Lessos, and fed the mourners. He stated that the deceased had been survived by a widow and four children, whose details he gave to the court. He described the deceased as a businessman who specialized in tomatoes, milk and vegetables, which he supplied to schools. He produced a letter from St. Joseph's Hostel, Maragoli, which indicated that he used to supply foodstuffs to that institution and would be paid Kshs. 23, 440.00 monthly. He produced another letter from the Sisters of Mary of Khayega, showing that he supplied foodstuffs to that institution and was paid Kshs. 223, 600.00 for 1<sup>st</sup> term and Kshs. 226, 800.00 for 3<sup>rd</sup> term. He also produced similar records from Mukumu Girls School. He stated that the deceased was 45 years at the date of his death, and produced his death certificate and letters of administration.

6. PW3, Regina Jelimo Magut, the 1<sup>st</sup> plaintiff, and one of the administrators of the estate of the deceased, testified on 2<sup>nd</sup> March 2009, she stated that she was the widow of the deceased, and confirmed that he died on 3<sup>rd</sup> September 2003 in a road traffic accident. She visited the Mbale District Hospital where she established that he had died as she found his body at the mortuary. She stated that they were married since 1977, and had four adult children, whose names she gave to the court. She testified that the deceased was their breadwinner, as he used to support them with school fees. She said as at the date of the accident, two the children had cleared secondary school, while the other two were still in school. She stated that after the deceased's death, life became very difficult for her, as she had to raise school fees for them. She had to sell part of the family farm to raise school fees. She also had to sell a family cow. She averred that the death of the deceased had caused her to suffer financially as she lost support in that respect.

7. At the conclusion of the oral hearing, the parties were directed to file written submissions. The only submissions that I have on record are from the plaintiffs. They are dated 13<sup>th</sup> March 2009, and were filed herein on 17<sup>th</sup> March 2009. On liability, the plaintiffs submit that the same ought to attach at 100% as the accident was self-involving, and the defendant had not offered any evidence to demonstrate that the doctrine of *res ipsa loquitar* did not apply. On damages under the Law Reform Act, the plaintiffs propose an award between Kshs. 80, 000.00 to Kshs. 100, 000.00 for loss of expectation of life and Kshs. 20, 000.00 for pain and suffering. For damages under the Fatal Accidents Act, the plaintiffs cited *Hellen Muhonja Maina vs. Peter Kinagi Gituka* HCCC No. 370 of 1990 for guidance. They proposed that the deceased used to earn roughly Kshs. 116, 106.70 from the evidence tendered, and submitted that that gross income be halved to cater for taxes and expenses. They proposed a multiplier of 15 years taking into account that the deceased was 45 at the time of his death. He would have continued to be active in business for 15 years or so. They also proposed a dependency ratio of 2/3. For compensation under the Fatal Accidents Act, the figure proposed came to Kshs. 6, 966, 396.00 worked out as follows:

$$58,053.30 \times 15 \times 12 \times 2$$

3

8. I did not conduct the oral hearing. The first witness was handled by GBM Kariuki J., while the other two testified before Ochieng J. I have noted that on both occasions the defendant was not represented despite service, and, therefore, the hearing was conducted in the presence of only one party. The evidence that one party tendered was, therefore, not controverted or challenged. Even when it came to the filing of written submissions, the defendant did not file any to counter the submissions made by the plaintiffs.

9. On liability, I find that the deceased was a fare paying passenger in the accident vehicle. The accident was self-involving for the accident vehicle was not in a collision with any other. The defendant pleaded in his defence statement that the same was occasioned by factors beyond its control, but it did not present any evidence at the oral hearing to support that contention. The doctrine of *res ipsa loquitar* no doubt applies. I, therefore, find that the defendant was 100% liable for the accident.

10. This is a fatal claim. Damages are awardable under both the Law Reform Act and the Fatal Accidents Act. Under the Law Reform Act, I have to consider what to award for pain and suffering and for loss of expectation of life. These are damages that go to the estate of the deceased, to compensate the estate for the pain and suffering that the deceased underwent before he died, and also to compensate the estate for having had his life cut short. The evidence on the exact point of death is not clear, as to whether he died instantly or later, either as he was being conveyed to hospital or at hospital, but it is clear that he died on the day of the accident. The amount awarded under this heading is usually Kshs. 20, 000.00, and that is the figure that I shall award in the circumstances. For loss of expectation of life, the court similarly awards figures that are standard ranging from Kshs. 80, 000.00 to Kshs. 100, 000.00. I shall accordingly award Kshs. 100, 000.00 under this head.

11. Under the Fatal Accident Act, the award is for the benefit of the dependants of the deceased, for what is referred to as loss of dependency. The material placed before me indicates that the deceased was a businessman dealing in foodstuffs that he delivered to institutions in Vihiga and Kakamega counties. I am persuaded that the multiplicand proposed of Kshs. 58, 053.30 would be reasonable given the evidence tendered. He died at 45 years, he would have perhaps continued to work beyond the age of 70. The multiplier of 15 is, therefore, reasonable. I shall accordingly award the sum of Kshs. 6, 966, 396.00 as worked out in paragraph 7 here above.

12. The final award should work out as follows:

- a. Pain and suffering Kshs. 20, 000.00;
- b. Loss of expectation of life Kshs. 100, 000.00; and
- c. Loss of dependency Kshs. 6, 966, 396.00.

TOTAL Kshs. 7, 086, 396.00.

13. I accordingly enter judgement for the plaintiffs and against the defendant for the sum stated in paragraph 12, with interest at court rates, and costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF January, 2020**

**W MUSYOKA**

**JUDGE**