



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 192 OF 2010

DWW (Suing as the legal representative and administratrix of the estate of

EWV-Deceased).....PLAINTIFF

-VERSUS-

NTIYIONE ADIJAH.....1ST DEFENDANT

THOMAS KIBOI.....2ND DEFENDANT

JUDGMENT

1. DWW, the plaintiff herein and the legal representative of the estate of EWV (*“the deceased”*) lodged a suit against the 1st and 2nd defendants by way of the plaint dated 8th April, 2010 in which she sought for general damages under the Fatal Accidents Act and the Law Reform Act, special damages in the sum of Kshs.158,100/ together with costs of the suit and interest thereon.

2. The defendants are sued in their capacity as the owners of motor vehicle registration number KAN 949N Mitsubishi Bus (*“the subject motor vehicle”*) at all material times.

3. The plaintiff pleaded in her plaint that sometime on or about the 10th day of April, 2007 the deceased was lawfully travelling aboard the subject motor vehicle as a passenger along Corner Moto along Kiserian-Magadi Road when the subject motor vehicle was involved in an accident resulting in the death of the deceased.

4. The plaintiff attributed the accident to negligence on the part of the defendants’ driver, servant and/or agent and set out its particulars under paragraph 7 of the plaint.

5. It was also pleaded in the plaint that at the time of his death, the deceased was a young and vigorous 39-year old man who supported his family financially and materially, and has now left behind the following dependants:

- | | | |
|----------|-------|--------------|
| i. DWW | Widow | 38 years old |
| ii. CWW | | 13 years old |
| iii. WWW | | 10 years old |
| iv. RKW | | 4 years old |

6. Upon being served with summons, the defendants entered appearance and filed their joint statement of defence on 7th June, 2010 to deny the plaintiff’s claim.

7. The defendants denied ownership of the subject motor vehicle and further denied the particulars of negligence pleaded in the plaint, averring instead that the accident was substantially or wholly the result of negligence on the part of the deceased.

8. At the hearing, the plaintiffs summoned two (2) witnesses while the defendants did not call any witnesses or participate at the hearing despite evidence to show that they were served with a hearing notice through their advocate.

9. Upon close of the trial, only the plaintiff filed written submissions.

10. On liability, the plaintiff submitted that the defendants ought to be held jointly and severally liable for the accident since the plaintiff had shown that the subject motor vehicle belonged to them both and that the said vehicle was being negligently driven on the material date. The plaintiff relied *inter alia*, on the case of **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another [2014]** where the Court of Appeal reasoned thus:

“...in Ormrod & Another –vs- Crossville Motor Services Ltd & Another 1953 (2) AER 753 CA, Denning LJ stated:-

“The law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner’s business or for the owner’s purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third party to be used for purposes in which the owner has no interest or concern.””

11. The plaintiff’s submission on damages is that awards of Kshs.300,000/ and Kshs.600,000/ would suffice for pain and suffering and loss of expectation of life respectively.

12. On damages for loss of dependency, it is the plaintiff’s contention that a multiplicand of Kshs.100,000/ would apply since the deceased was earning a monthly salary of the said amount at the time of his death. The plaintiff further urged this court to apply a multiplier of 26 years in considering the deceased’s age and with the official retirement age of 65 years, and a dependency ratio of 2/3 to be tabulated as follows:

$$\text{Kshs.100,000} \times 12 \times 26 \times 2/3 = \text{Kshs.20,800,000/}$$

13. Finally, the plaintiff urged that this court awards special damages in the sum of Kshs.158,100/ pleaded in the plaint and demonstrated in the funeral expenses incurred by the family of the deceased.

14. I have considered the evidence on record, the submissions and authorities relied upon by the plaintiff. It is clear that the twin issues for determination are liability and quantum.

15. On liability, the plaintiff in her testimony as PW1 first adopted her executed witness statement and bundle of documents. She went on to state that she came to learn of the accident and the passing of the deceased from a third party, at which point she visited the police station and was issued with a police abstract.

16. The plaintiff further gave evidence that as per her knowledge, the 2nd defendant was the owner of the subject motor vehicle while the 1st defendant was its driver on the material date.

17. Peter Muriithi Mwaniki who was PW2 similarly adopted his signed witness statement and testified that he was heading home on the material date at about 7.00p.m. when he witnessed the subject motor vehicle moving at a high speed just before it crashed. According to this witness, the deceased was among the passengers aboard the subject motor vehicle at the time.

18. Upon my examination of the evidence on record, both oral and documentary, I established that an accident took place on the material date involving the subject motor vehicle, the result of which the deceased lost his life.

19. On the subject of ownership of the subject motor vehicle, the plaintiff tendered a copy of records dated 31st March, 2010 as P. Exh 6 indicating that the 1st defendant was the registered owner of the subject motor vehicle at all material times.

20. The aforesaid evidence was not at all challenged by the defendants through evidence, though I note that in her testimony, the plaintiff indicated the 1st defendant as being the driver of the subject motor vehicle, which position contradicts the identity of the driver shown in the police abstract. Suffice it to say that, in the

absence of evidence to the contrary, I am of the view that the contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the provisions of **Section 8 of the Traffic Act, Cap. 403 Laws of Kenya** which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner.

21. Furthermore, the plaintiff tendered the police abstract relating to the accident as P. Exh 1 the contents of which I also considered. According to the police abstract, the 2nd defendant was the owner of the subject motor vehicle while the driver who is not a party to this suit was identified as Swaleh Nzaka Ndigo.

22. The defendants on their part did not challenge the contents of the police abstract by way of evidence or at all during the trial. In the absence of contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in the case of **Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another (2010) eKLR** as referenced in the case of **Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki [2016] eKLR** that:

“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”

23. Going by the legal positions above and my examination of the evidence produced in court, I am satisfied that the plaintiff has proved on a balance of probabilities that the 1st and 2nd defendants were at all material times the registered and/or beneficial owners of the subject motor vehicle.

24. In regards to the question of negligence, while it is apparent from the evidence of PW1 that she did not witness the accident but came to learn about it later on, PW2 testified that he was a pedestrian in the area where the accident occurred, which therefore made him an eye witness to the accident.

25. Moreover, PW2 gave a detailed account of the moments leading up to and following the accident and his evidence is supported by the contents of the police abstract, both of which were not controverted by the defendants at the trial.

26. In addition thereto, the police abstract indicated the matter as pending under investigations at the time but went ahead to state that the driver was scheduled to take a plea, though no details were divulged.

27. Be that as it may, the plaintiff pleaded the doctrine of *res ipsa loquitur* which would prove relevant in determining whether there was negligence on the part of the defendants.

28. The said doctrine was aptly discussed in the authority of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to the **East African Court of Appeal’s decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22** where the following was enunciated:

“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”

29. From my understanding of the above rendition, a mere pleading of the doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

30. In the present instance, the plaintiff discharged the burden of proof by pleading the doctrine and it fell upon the

defendants to disprove it but they did not.

31. In the premises, I am satisfied that the plaintiff has made her case against the 1st and 2nd defendants to the required standard and I hereby enter a finding of 100% liability against both defendants jointly and severally.

32. Having settled the first issue, I turn my attention to the second issue on quantum and which I shall address under the following heads.

a) General damages

(i) Pain and suffering

33. Going by the evidence of PW1 and PW2, the deceased died on the spot. Their evidence is supported by the autopsy report prepared by Dr. Macharia B.N. and produced as P. Exh 3 indicating that the deceased passed on at the scene of the accident. Further to this, I examined the certificate of death adduced as P. Exh 2 which confirms that the deceased died on the date of the accident.

34. Upon considering the sum of Kshs.300,000/ suggested by the plaintiff under this head, I am of the view that the same falls on the higher side. In any event, the plaintiff did not cite any supporting authorities in that regard.

35. Upon considering the legal principle that nominal awards are made in instances where death occurred immediately after an accident, I find an award of Kshs.20,000/ to be reasonable, being persuaded by similar awards made in the recent cases of **Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another [2019] eKLR** where a deceased person died instantly and **Mumias Sugar Company Limited v Henry Olukokolo Ashuma (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another [2018] eKLR** where the evidence did not clearly bring out whether the deceased died at the scene or in hospital.

(ii) Loss of expectation of life

36. Under this head, I considered the award of Kshs.600,000/ suggested by the plaintiff. I also took into account the evidence to show that the deceased was aged 39 years, was in good health and had high prospects.

37. I am of the view that the proposed award is quite high and incomparable to previous awards made under this head. Upon considering the conventional award of Kshs.100,000/ made in the case of **Mumias Sugar Company Limited v Henry Olukokolo Ashuma (supra)**, I am convinced that a similar award of Kshs.100,000/ would constitute adequate damages for loss of expectation of life.

(iii) Loss of dependency

38. It was the evidence of the plaintiff that preceding his death, the deceased worked as an Engineer and that he supported her and their three (3) children.

39. On the multiplier, I examined the certificate of death for the deceased which confirms that the deceased was aged 39 years, consistent with the evidence of the plaintiff.

40. Whereas the plaintiff suggested a multiplier of 26 years, she did not cite any comparable authorities. I therefore turn my attention to the case of **Martin Gitau & another v Shadrack Mulonzi & another [2018] eKLR** in which the High Court on appeal substituted a multiplier of 26 years with one of 16 years in the instance of a 39-year old deceased person, and the more recent case of **Multiple Haulers Transporters (EA) Ltd v Josephine Nzioka Muia [2019] eKLR** where this court sitting on appeal upheld the use of a multiplier of 18 years for a deceased bearing similar age.

41. All things constant, the deceased would possibly have worked up to the formal retirement age ranging between 55 and 60 years. However, taking into account the vagaries of life and the authorities I have just cited, I will apply a reasonable multiplier of 18 years.

42. On the question of the dependency ratio, I examined copies of the certificate of marriage to confirm the marriage between the deceased and the plaintiff, and the birth certificates for the deceased's three (3) children with the plaintiff produced as P. Exh 7 and 8. Upon taking this evidence into account, I find the ratio of 2/3 proposed by the plaintiff to be reasonable.

43. In respect to the multiplicand, the plaintiff in addition to her oral evidence that the deceased worked as an Engineer, availed a copy of the deceased's pay slip for the month of November, 2006. According to the same, the deceased was an employee of Magadi Soda Company Limited earning a gross consolidated salary of Kshs.89,654.60. On calculating the gross salary less statutory deductions alone, I arrived at the sum of Kshs.69,842.60 which would be the applicable net income for the deceased for purposes of an award.

44. The tabulation of damages under this head is as follows:

$$\text{Kshs.69,842.60} \times 18 \times 12 \times \frac{2}{3} = \text{Kshs.10,057,334.40}$$

b) Special damages

45. Under this head, the plaintiff produced receipts totalling the sum of Kshs.11,050/ and this is what I will award in due consideration of the legal principle that special damages ought to be specifically pleaded and strictly proved.

46. Accordingly, I hereby enter judgment in favour of the plaintiff and against the 1st and 2nd defendants as follows:

i. The defendants are found to be wholly liable.

ii. Quantum

a) General damages

i. Pain and suffering	Kshs. 20,000/
ii. Loss of expectation of life	Kshs. 100,000/
iii. Loss of dependency	Kshs.10,057,334.40

b) Special damages **Kshs. 11,050/**

TOTAL **Kshs.10,188,384.40**

The plaintiff shall have cost of the suit and interest on special damages at court rates from the date of filing the suit and interest on general damages at court rates from the date of judgment until payment in full.

Dated, signed and delivered virtually via Microsoft Teams at Nairobi this 19th day of June, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant