



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 358 OF 2006

**SOLOMON OKOTH ODUMA (Suing as the personal representative of the
estate of MARTIN OMONDI OKOTH-Deceased).....PLAINTIFF**

-VERSUS-

MUNYARUGEREO GERMAN.....1ST DEFENDANT

RWAKEN INVESTMENTS LIMITED.....2ND DEFENDANT

JUDGEMENT

1. Solomon Okoth Oduma, the plaintiff herein and the personal representative of the estate of Martin Omondi Okoth (“the deceased”) instituted a suit against the 1st and 2nd defendants by way of the plaint dated 30th March, 2006 and sought for general damages under the Law Reform Act, Cap. 26 Laws of Kenya and the Fatal Accidents Act, Cap. 32 Laws of Kenya, special damages in the sum of Kshs.160,258/ together with costs of the suit and interest thereon.

2. The 2nd defendant is sued in its capacity as the registered owner of motor vehicle registration number KAL 970P (“the subject vehicle”) at all material times while the 1st defendant is sued in his capacity as the driver and/or policy holder of the insurance policy in respect to the subject vehicle at all material times.

3. The plaintiff pleaded in the plaint that sometime on or about the 21st day of December, 2001 the deceased was lawfully walking on the pedestrian side of the road along Jogoo Road when the 1st defendant and/or an agent of the 2nd defendant negligently drove the subject vehicle, causing the same to knock down the deceased, leaving him with fatal injuries.

4. The plaintiff further pleaded in the plaint that in the alternative, the deceased was on the aforementioned date a fare paying passenger in the subject vehicle when the 1st defendant and/or an agent of the 2nd defendant negligently drove the subject vehicle, resulting in an accident which took the life of the deceased.

5. It was pleaded in the plaint that immediately following the accident, the defendants herein whether by themselves or through their servants/agents carried the body of the deceased and dumped him near the Catholic University of Eastern Africa in Karen, where his body was later discovered.

6. It was similarly pleaded in the plaint that the deceased who was a young man aged 28 years and enjoying robust health prior to his death has left behind the following dependants:

- | | |
|------------------------|--------|
| i. Solomon Okoth Oduma | Father |
| ii. Mary Okoth | Mother |

7. Upon service of summons, the 1st and 2nd defendants entered appearance and filed a joint statement of defence dated 30th June, 2006 to deny the plaintiff’s claim.

8. At the hearing, the plaintiff testified and summoned one (1) other witness while the defendants called two (2) witnesses to testify.

9. The plaintiff who was PW1 adopted his signed witness statement as evidence and produced his bundle of documents as P. Exh 1-11. The

plaintiff then stated that he was informed of the accident and the passing of the deceased sometime following the said accident.

10. The plaintiff stated that he visited Buruburu Police Station where he learnt that the subject vehicle had been detained and that the registration details of the subject vehicle are clearly set out in the police abstract which was tendered as P. Exh 2.

11. In cross-examination, the plaintiff testified that though he did not witness the accident, he was later informed that it is the subject vehicle that knocked down the deceased. The plaintiff acknowledged that he did not call any eye witness to the accident to testify.

12. The plaintiff also testified that he has no knowledge of there being two (2) varying reports regarding the registration details of the motor vehicle that was involved in the accident.

13. It was the evidence of the plaintiff that at the time of his death, the deceased was earning a salary of Kshs.1,000/ every month though he did not have a pay slip to show this.

14. In re-examination, the plaintiff stated that he obtained details of the accident from Makongeni Police Station and later, at Buruburu Police Station, which show that the subject vehicle was involved in the accident. The plaintiff added that before his death, the deceased worked for Unga Limited upon graduating from Nairobi Business School.

14. PC Patrick Nyongo (PW2) gave evidence that he was at all material times been attached to Makongeni Police Station, Traffic Investigation.

16. The witness testified that according to the Occurrence Book (OB) records he had an accident which took place on the night of 21st/22nd December, 2001 which was reported by Michael Orina and Beatrice Kahami who indicated that they had witnessed a man by the name Okoth Ouma being run over by the subject vehicle and that the driver and conductor then took the deceased who was still alive at the time and put him in the subject vehicle and took him to an unknown destination.

17. The witness further testified that it is the police stationed at Buruburu Police Station who investigated the accident and issued the police abstract. The witness added that an OB can be used to generate a police abstract.

18. The witness stated that the OB recorded at Buruburu Police Station bears different registration details from that in Makongeni Police Station, namely KAL 970F instead of KAL 970P, the latter of which constitutes the subject vehicle. In the view of the witness, this could be the result of an error on the part of the person who was recording the information.

19. It was the evidence of PW2 that the body of the deceased was later discovered in a forest along Ngong Road.

20. In cross-examination, the witness gave evidence that the police abstract indicates the matter as pending under investigation and that he has no knowledge as to whether the driver of the subject vehicle was ever charged in relation to the material accident.

21. It was also the evidence of PW2 that the purpose behind his testimony was to clarify that the accident was caused by the subject vehicle and to also clarify that there were errors in the records following the report made at Buruburu Police Station.

22. The witness stated that the body of the deceased could have been dumped in the forest to conceal the fact that his fatal injuries were as the result of the material accident.

23. In closing, PW2 gave evidence that an inquest was conducted into the circumstances surrounding the death of the deceased and that the inquest report is with the police at Buruburu Police Station.

24. During re-examination, it was the testimony of the witness that the accident was reported on 22nd December, 2001. This marked the close of the plaintiff's case.

25. Jean Bosco Ndarugoragoye (DW1) adopted his witness statement and went ahead to state that he did not receive any information that the subject vehicle belonging to him was involved in the material accident and further that the driver of the said vehicle at the time has since passed away.

26. According to this witness, the records from the OB in Buruburu Police Station bear two (2) varying registration details: one, that the motor vehicle involved in the accident was KAN 970F, while another shows the subject vehicle as the vehicle involved in the material accident.

27. In cross-examination, the witness testified that he had no documentation to show that the subject vehicle was returned to him on the date of the accident and parked in his compound by 10.00p.m. as indicated in his statement and oral testimony in chief.

28. PC Masinde (DW2) began his testimony with the statement that he is attached to Buruburu Police Station, performing traffic duties.

29. He went on to state that according to the OB, motor vehicle registration number KAN 970F was involved in an accident on route 58 and that following the accident, the driver and conductor of the aforementioned vehicle took the victim who was later discovered to be the deceased herein, to an unknown hospital.

30. The witness testified that according to the OB in his possession, the deceased was a passenger in the aforementioned vehicle and that the accident took place on 22nd December, 2001 at an undisclosed time along Jogoo Road junction to Eastleigh.

31. It was the evidence of DW2 that going by the record, two (2) different motor vehicles have been referred to and that his attempts at tracing the file relating to the accident have proved futile.

32. The witness further gave evidence that an inquest had been done in the matter but that he had no knowledge of its outcome.

33. In cross-examination, DW2 testified that the deceased was a passenger in the aforementioned motor vehicle and that the only difference between the OBs from Makongeni and Buruburu Police Stations lies in the registration details of the motor vehicles involved. However, the witness stated that this could be due to human error.

34. During re-examination, the witness restated his earlier averments. This marked the close of the defence case.

35. Upon close of the hearing, this court issued directions for the parties to put in written submissions, which they did.

36. On his part, the plaintiff submits that the evidence on record clearly shows that the subject vehicle was involved in the accident which resulted in the passing of the deceased.

37. The plaintiff further submits that he has brought real evidence; namely the copy of records and the police abstract; to show that the subject vehicle was being driven on the material date by the 1st defendant and that the same was owned by the 2nd defendant. The plaintiff relied on the following decision by the Court of Appeal in the case of **Board of Governors of Kangubiri Girls High School & another v Jane Wanjiku Muriithi & another [2014] eKLR**:

“The vicarious liability of the 1st appellant in this case is not contested. In the case of Kenya Bus Services Ltd –v- Humphrey [2003] KLR 665 which followed Karisa –v- Solanki [1969] EA 318; the following proposition was made:

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard- v -Sully (1931) 47 TLR 557).”

38. It is the submission of the plaintiff that having pleaded the doctrine of res ipsa loquitur, the presumption of negligence/liability arises against the defendants and which presumption cannot be rebutted by any of the defendants. To buttress his argument, the plaintiff quoted the case of **Kago v Njenga [1979] eKLR** in which the Court of Appeal rendered itself thus:

“For the defence to rebut the presumption of negligence arising from “res ipsa loquitur”, it was for the defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part, or that the accident was due to circumstances not within their control (see Msuri Muhddin v Nazzor bin Seif el Kassaby and Another [1960] EA 201).”

39. The plaintiff therefore urged this court to enter a finding of 100% liability against the defendants herein.

40. On quantum, the plaintiff contends that he is entitled to the sum of Kshs.160,258/ on special damages, having pleaded and proved the same.

41. In respect to general damages for pain and suffering, the plaintiff proposed the sum of Kshs.50,000/ and cited inter alia, the case of **Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR** where the High Court sitting on appeal upheld an award of Kshs.50,000/ made under this head to the estate of a deceased who died immediately following the accident.

42. The plaintiff further suggested a sum of Kshs.200,000/ on damages for loss of expectation of life. To support its proposal, the plaintiff referred this court to various authorities, including the case of **Vincent Kipkorir Tanui (Suing as the administrator and/or Personal representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co. Ltd & another [2018] eKLR** and **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR** where the respective courts upheld the award of Kshs.200,000/ for this head.

43. Concerning damages for loss of dependency, the plaintiff suggested a multiplicand of Kshs.30,000/ being the monthly salary the deceased earned before his death, a multiplier of 32 years and a ratio of ½ to be tabulated as follows:

$$\text{Kshs.30,000} \times 12 \times 32 \times \frac{1}{2} = \text{Kshs.5,760,000/}$$

44. In reply, the defendants on their part have argued that the plaintiff has not proved his case for negligence on a balance of probabilities since he has not shown that the subject vehicle knocked down or otherwise injured the deceased.

45. The defendants have further argued that on the material date, the subject vehicle was returned to the premises of the 2nd defendant at 10.00p.m. and hence it could not have been involved in the accident.

46. It is the submission of the defendants that according to the police abstract which was tendered as evidence, the matter was pending under

investigations and if at all the defendants were liable, this would have been shown in the outcome of such investigations.

47. The defendants further contend that the circumstances surrounding the death of the deceased are unclear in the absence of any eye witness testimony and in the absence of any evidence by the investigating officer. The defendants placed reliance on the case of **David Kajogi M'mugaa v Francis Muthomi [2012]eKLR** where the court held that:

“The trial court failed to observe and note that the investigating officer’s report could not be said to be conclusive as to the occurrence of the accident and who was to blame as the officer was not at the scene at the time of the occurrence of the accident. That the report had no statements of eye witnesses. That the report was not thorough as both P.W.2. and D.W.1. admitted in their evidence there were witnesses to the accident. That no sketch plan was produced giving details as to the point of impact, where the deceased lied and where the vehicle stopped after the accident.

I therefore do not agree that the evidence of an investigating officer alone can be conclusive as to who is to blame for the accident nor can it be said to be binding on the court and I hold such evidence is mere opinion to the court, which court can accept or reject for various reasons.”

48. It is the argument of the defendants that whereas the inquest proceedings and outcome were never presented before this court, it is apparent that the circumstances surrounding the death of the deceased are unclear and cannot necessarily be linked to the defendants for a finding of liability to be entered against them.

49. The defendants advanced the argument that should this court enter a finding of liability, then the same should be apportioned equally between the plaintiff and themselves.

50. On quantum, the defendants urged a conventional award of Kshs.100,000/ under the head of general damages for loss of expectation of life.

51. For loss of dependency, the defendants submit that in the absence of proof of earnings or employment, the minimum wage regulations applicable in 2001 would be relevant. The defendants urged this court to apply the sum of Kshs.4,000/ together with a multiplier of 20 years and a ratio of 1/3 to be tabulated as follows:

$$\text{Kshs.4,000} \times 12 \times 20 \times 1/3 = \text{Kshs.320,000/}$$

52. On damages for pain and suffering, it is the suggestion of the defendants that a sum of Kshs.10,000/ would suffice since the timelines of the deceased’s death following the accident are unclear.

53. In regard to special damages, the defendants submit that the plaintiff only proved the sum of Kshs.151,058/.

54. Upon considering the evidence on record, the submissions and authorities relied upon by the parties the twin issues for determination are liability and quantum commend themselves for determination.

55. On the *first* limb to do with liability, following my examination of the evidence on record, both oral and documentary, there is no doubt that an accident took place on the material date and at the place pleaded in the plaint, the result of which the deceased lost his life.

56. On the subject of ownership of the subject motor vehicle, the plaintiff tendered a copy of records dated 28th June, 2005 as P. Exh 4 indicating that the 2nd defendant was the registered owner of the subject vehicle at all material times.

57. The aforesaid evidence was not at all challenged by the defendants through evidence. 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.

58. Furthermore, the plaintiff tendered the police abstract relating to the accident as P. Exh 2, the contents of which I also considered. According to the police abstract, DW1 who stated in his evidence that he is a director of the 2nd defendant was indicated as being the owner of the subject motor vehicle while no identification was made as to the driver thereof.

59. 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”

60. From the foregoing, I am satisfied that the plaintiff has proved on a balance of probabilities that the 2nd defendant was at all material times the registered owner of the subject vehicle.

61. As concerns the 1st defendant, however, I did not come across any evidence to show that he was at all material times the driver or agent of the 2nd defendant. As earlier noted, the police abstract does not include the name or details of the driver. I am therefore not satisfied that the plaintiff has in any way linked the 1st defendant to the subject vehicle.

62. This brings me to the subject of negligence. In order to prove negligence, the plaintiff would be required to satisfy the elements associated with the tort of negligence.

63. While there were varying accounts from the plaintiff as to whether the deceased was a pedestrian or a passenger, the evidence tendered leads me to conclude that the deceased was travelling as a passenger when the accident took place.

64. It is noteworthy that a key issue that arose at the trial had to do with which of the vehicles between the subject vehicle and motor vehicle registration number KAN 970F was involved in the material accident. Going by the oral evidence, particularly that of PW2, DW1 and DW2, it is apparent that there were varying records in the OB regarding the vehicle involved.

65. PW2 and DW2, both of whom are police officers by profession, acknowledged the confusion in the OB records made at Makongeni Police Station and Buruburu Police Station. The two (2) witnesses went on to state that this could have been the result of an inadvertent error on the part of the person recording the information.

66. None of the OB records in question were adduced as evidence before this court. Furthermore, none of the parties specifically challenged the contents of the police abstract tendered in evidence, which linked the subject vehicle to the accident.

67. Moreover, while DW1 stated in his evidence that the subject vehicle was returned to his premises at about 10.00pm. he did not bring any credible or corroborating evidence to support this assertions.

68. From the above, it is more plausible than not that the subject vehicle was involved in the material accident.

69. Still on negligence, upon studying the police abstract, I note that the matter was indicated as pending under investigations at the time. Nonetheless, the oral evidence presented was that an inquest had been carried out and concluded. However, none of the parties availed a copy of the inquest proceedings or the resulting decision for this court's reference or consideration. It is also apparent that none of the parties are aware of the outcome of the inquest proceedings. In the circumstances, this court can only consider the credible evidence placed before it.

70. I appreciate the position taken by the defendants that the plaintiff had not called an investigating officer to shed light on his or her findings upon investigating the accident. From my examination of the evidence, I note that whereas the police abstract indicated the name of the investigating officer, it is true that he was not summoned as a witness.

71. 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.

72. The above 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.”

73. The doctrine was further expounded in the case of **Kago v Njenga [1979] eKLR** whose holding is cited hereinabove.

74. From the foregoing, I observed that once pleaded, the *res ipsa loquitur* 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.

75. In the present instance, the plaintiff having discharged the burden of proof by pleading the doctrine and this court having determined that the subject vehicle owned by the 2nd defendant was involved in the material accident, it fell upon the 2nd defendant to disprove these factor but it did not. The 2nd defendant was therefore vicariously liable for the negligent acts of its driver/agent/servant.

76. In the premises, I am satisfied that the plaintiff has made his case against the 2nd defendant to the required standard and I hereby enter a finding of 100% liability against the 2nd defendant. In the absence of any evidence linking the 1st defendant to the circumstances surrounding the subject vehicle or the material accident, I have no alternative save to dismiss the plaintiff's case against the 1st defendant with costs.

77. 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

78. From the pleadings and evidence, it is apparent that the accident took place on or about the 22nd day of December, 2001. The postmortem report (P. Exh 5) and the death certificate (Pp. Exh 6) both confirm that the deceased died on 22nd December, 2001. From the evidence presented, however, it remains unclear how much time had passed between the accident and the passing on of the deceased and there is nothing to indicate that he was taken to hospital for treatment.

79. Upon considering the respective sums suggested by the parties and the authorities cited by the plaintiff since the defendants did not cite any guiding authorities, I am persuaded to award a sum of Kshs.20,000/ with guidance from the case of **Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko–Deceased) [2015] eKLR** and **Kenya Wildlife Services v Geoffrey Gichur Mwaura [2018] eKLR** where similar awards were made in respect to deceased persons who died either immediately or soon after the respective accidents.

ii. Loss of expectation of life

80. The evidence on record shows that the deceased died at the young age of 28 years. There is nothing to indicate that he was of ill health.

81. The courts have been known to grant the conventional sum of Kshs.100,000/ 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 (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another [2018] eKLR** 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/lost years

82. Going by the evidence which I have examined, I note that the plaintiff did not bring any credible evidence to support the assertion that the deceased was working at Unga Limited and earning a daily salary of Kshs.1,000/. In the absence of any proof of earnings or the nature of occupation that the deceased was engaged in, I am of the view that a global approach would be more suitable to the present circumstances, as opposed to a multiplier approach.

83. I therefore considered the case of **Razco Company Limited v Casmiel Odhiambo Okati & another (Suing as Legal Representatives of Steve Obunga Odhiambo) [2019] eKLR** where the court applied a global approach and awarded a sum of Kshs.2,300,000/ to the estate of a deceased aged 28 years.

84. Taking into consideration inflation factors, I will award a sum of Kshs.2,000,000/ under this head.

85. On the subject of deductions which was raised in the defendants' submissions, the legal position is that the plaintiff is lawfully entitled to seek general damages under the heads of pain and suffering and loss of expectation of life under the Law Reform Act, and general damages for loss of dependency under the Fatal Accidents Act; and there is no need for damages awarded under the Fatal Accidents Act to be deducted from the total award. In so finding, I am bound by the decision of the Court of Appeal in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] Eklr** where the Court of Appeal expressed itself inter alia as follows:

"In my view what section 2(5) of the Law Reform Act means is that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should not be taken into account and not necessarily deducted...There is no requirement in law or otherwise for him to engage in a mathematical deduction..."

b. Special damages

86. It is trite law that special damages must be both specifically pleaded and strictly proved. Having considered the pleading and having examined the evidence tendered by the plaintiff, I find that the plaintiff only availed receipts totaling the sum of Kshs.150,908/ to prove funeral and other related expenses incurred as well as costs incurred in obtaining the police abstract. I can therefore only award the above sum.

87. Consequently, judgement is entered in favour of the plaintiff and against the 2nd defendant as follows:

Liability **100%**

a. General damages

i. Pain and suffering **Kshs.20,000/**

ii. Loss of expectation of life	Kshs.100,000/
iii. Loss of dependency	Kshs.2,000,000/
b. Special damages	Kshs.150,908/
Total	Kshs.2,270,908/

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

The case against the 1st defendant is dismissed with costs.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 18th day of September, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant