



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R MWONGO, J)

MILIMANI LAW COURTS

CIVIL SUIT NO.716 OF 2006

JENNIFER NGINA MULAA & ANOTHER (Suing as the personal
representative of the estate of **George Mulaa Masya** (Deceased)...**PLAINTIFF**

VERSUS

KENYA AIRWAYS LIMITED.....**1ST DEFENDANT**

BENJAMIN NYAATA OBINCHU.....**2ND DEFENDANT**

JUDGMENT

1. This suit is filed by the wife and brother of the late George Mulaa Masya in their capacity as personal representatives of the deceased's estate.
2. The deceased died as a result of an accident that occurred on 6 March 2004 along Mbagathi Road dual carriageway near the Forces Memorial Hospital. The evidence is scanty in that there was only one eyewitness, namely Benjamin Nyaata Obinchu, the second defendant. He was the driver of vehicle registration number KAH 813L belonging to Kenya Airways, that fatally knocked the deceased down when he was crossing the road from the direction of the hospital.
3. The plaintiffs blamed the accident on the defendants and seek damages. They assert that the plaintiff was 33 years old at the time of his death, and was employed as an officer with the Kenya Prisons department. At the time of his death he was survived by his wife, two daughters, a son and his mother, all of whom were dependents. The plaintiffs claim and both the Fatal Accidents Act and the Law Reform Act.
4. Following the accident, the second defendant was charged in Nairobi **Chief Magistrates Criminal Traffic Case No 863 of 2004, Kibera**, in which he was convicted with the offence of driving a defective vehicle, but acquitted for the offence of reckless driving. The defects were: steering drive shafts dust boots were torn; offside headlamp was defective; near-side brake light not working. The transport supervisor of Kenya Airways Limited, was also found guilty of permitting a defective motor vehicle be used on a public road.
5. Only two issues are for determination in this matter.
 - a) Whether the deceased's death was caused by the negligence of the defendants
 - b) If so, what relief is the plaintiff entitled to?

Liability

6. The accident story is told by the only eyewitness of the accident and supplemented by the evidence of the police officer who collected the body of the deceased from the scene.
7. According to the second defendant, on 6 March 2004 at about 7:30 pm he had just driven from Golf Course estate. He testified that whilst:

“...driving on Mbagathi Road I had joined the road from Golf Course (estate) at the slope on the Railway Bridge someone

jumped onto the road from and hit the car on the right side front of the right indicator. He fell on the windscreen and back onto the right side.

Mbagathi Road is a dual carriageway. The man came from the island in between the dual carriageway I was driving at 50 kmh. There was no zebra crossing that part of the road....”

The second defendant said that after he stopped his car some air force men came and took the victim by ambulance and told him to report to the police station.

8. The second defendant further testified that:

“I did not see the man on the ground because I was shocked. I stayed in the car for a while.... I did not see the victim before he jumped onto the road.....The victim cross (sic) at a black spot....It was after the bridge where there is a steep slope. There was no zebra crossing”

9. In cross examination, the second defendant stated that:

“I was in the car I had lost my senses. I was in a state of shock. I did not see the events that happened after the accident....I said the victim smelled of alcohol. I smelled the blood – it smelt of alcohol. It was a black spot because it is at a slope. You cannot see”

10. In the Traffic Case, the evidence of PC Benjamin Kemei was that he arrived at the scene within 20 minutes of a report being received from the area control room. He testified that:

“At the scene, we found a fatally injured pedestrian lying on the side. We did not decrease the motor vehicle involved, not at the scene. The deceased was male. We asked bystanders if they had seen motor vehicle, in vain. Officers from Kenya army who had removed body from the road to side said they had suspected a Kenya Airways motor vehicle hit and run but had not taken registration number. I drew you road view. Removed body to city mortuary. While at police station we found the motor vehicle KAL 813H Nissan Primera saloon with driver Benjamin Oyata waiting at police station to particulars of Weber and motor vehicle and detained it for inspection.”

11. In cross examination, PC Kemei said :

“Having considered the weather was dry and visibility not obstructed, I decided accused one was a reckless. This is a road view not sketch plan. The point of impact was on the roadIt was night-time. It was dark ...”.

12. In the traffic case in the lower court, the second defendant testified that the vehicle was in serviceable condition and that all damage and effects arose after the accident. He, however, admitted that:

“ Normally I don’t check driving shafts. The mechanics did it.... I only take it for a checkup if problems arise..... On 6/3/04 I have no proof of any checkup on the car in other areas...”

13. My assessment of the totality of the forgoing evidence in relation to liability is as follows: the accident occurred at around 7 to 7.30 pm on 6 March 2004. The weather was dry and there was good visibility. It was dark and, from the evidence in the traffic case, the vehicle had defective steering dust rubber boots and the offside headlamp was defective. It appears reasonable to conclude that the driver’s visibility was hindered by the defective offside headlamp. Equally a reasonable conclusion can be made that the steering capability was affected, however minimally, by the defects in the steering dust rubber boots.

14. According to the first defendant he was driving at approximately 50 km/h down a slope on a road section he considered to be black spot. He even gave the reasons specifying why he considered the area to be black spot: It was at a slope, and you couldn’t see. It is also clear from the available evidence that there was no zebra crossing on the road. In any event, considering the fact that this section was a black spot, the driver should have anticipated any eventuality on the road. Nevertheless, whatever speed he was driving at, the impact was enough cause the deceased to be tossed up and into the windshield, shattering it and resulting in instant fatality. The deceased’s body was collected by PC Kemei twenty minutes later and taken to the City mortuary.

15. According to the Death Certificate exhibited, the deceased died due to head injury due to brain hemorrhage. From his evidence, the driver did not see the body on the ground after the accident. He said he was “in shock” and “lost all his senses”. He said he stayed in the car for a while after the accident, and thought that some army officers carried the body away.

16. Given that the accident area was a black spot according to the driver, and that on this sloping section you “cannot see”, and given that the driver’s vehicle had two pertinent defects that potentially further affected his ability to see and interfered with the steering capability of the vehicle, I consider that the driver assumes much greater responsibility for the accident. In my view, a driver driving in a black spot area at night ought to be aware of the dangers a moving vehicle poses on a road. On the strength of the available evidence, therefore, I would apportion liability at 90% for the driver who is the 2nd defendant, and 10% for the pedestrian who crossed the road at a point where there was no zebra crossing.

17. The second defendant sought to place liability on the deceased by saying he smelt the blood and it smelled of alcohol. This action

contradicts his other evidence that he was in such a state of shock after the accident that he lost his senses and stayed in the vehicle for about 20-30 minutes before he regained consciousness. He did not say that when he came out of the vehicle he determined to smell the blood stains either on the vehicle or on the ground, and it is not something that would reasonably be expected of a person who had been in such shock he had lost consciousness. It does not appear credible, and I place little probative value on it.

Quantum

Special damages (under the Law Reform Act)

18. There is no dispute on the special damages of Kshs 41,770/= claimed by the claimant. These will be awarded in that amount.

Pain and suffering (under the Law Reform Act)

19. An award for pain and suffering is made to compensate for the amount of agony and pain endured by a victim upon occurrence of the accident before death. Here, it is not disputed that the deceased died instantly upon the occurrence of the accident, and the body taken straight to the mortuary. The plaintiffs claimed Kshs 200,000/= for the combined loss of expectation of life and pain and suffering and the defendants admit only Kshs 20,000/= for pain and suffering. The defendants relied on **Phyllis Wairimu Macharia v Kiru Tea Factory [2016] eKLR** where the court awarded Kshs 10,000/=. The plaintiff relied on some older authorities, namely, **Lorna Amino v Akamba Public Road Service & Another [2008] eKLR** and **Leonard Akisa & Another v Major K Birgen [2005] eKLR** where the court awarded Kshs 35,000/= and 30,000/= respectively.

20. In the present case, I think an award of Kshs 40,000/= for pain and suffering is appropriate. I so award.

Loss of Expectation of Life (Under the Law Reform Act)

21. The plaintiff claimed the amount of Kshs 1,500,000/= under this head. The defendants offer no more than Kshs 100,000/= thereunder.

22. On this head, the plaintiff cited the case of **Benedeta Wanjiku Kimani v Changwon Cheboi & Another [2013] eKLR** in which the life expectancy was said to have increased to sixty (60) years. In that case, the actual amount of damages awarded under that head was Kshs 100,000/=. A similar amount was awarded in the **Phyllis Wairimu Macharia** case (supra); whilst in **Leonard O Ekisa v Major K Birgen**, the amount awarded under this head was Kshs 30,000/=.

23. The defendant also cited the case of **Benedeta Wanjiku Kimani (supra)** where the court, Emukule J, aptly explained the jurisprudence on loss of expectation of life and pain and suffering as follows:

“In common law jurisprudence of which Kenya is a part, the courts have evolved to principles, loss of expectation of life and pain and suffering by the deceased for award of damages under the Fatal Accidents Act.. For pain and suffering....determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident, worth something the estate. The generally accepted principle is that very nominal damages will be awarded on this head of claim if death followed immediately after the accident. Higher damages will be awarded the pain and suffering was prolonged before death in this case, the conventional figure for loss of expectation of life is shs 100,000/=...”

24. In this case, no reason was advanced to justify an award beyond Kshs 100,000/= under this head, and I award the said amount.

Loss of Dependency (under the Fatal Accidents Act)

25. It is not disputed that the deceased was thirty three (33) years at the time of his death, and this is supported by the certificate of death. The deceased was survived by his wife Jennifer Ngina Mulaa, who was not employed, is a subsistence farmer whose crop depends entirely on the rain, and with whom he had three children. She said that when her husband was alive, they fully depended on him.

26. There was evidence – by way of birth certificates – concerning the deceased’s three dependent children: Peris Kathii born in 1995; Dennis Kathumbi born in 1998 and Caroline Mbuya born in 2003 born in aged respectively. Their ages at the time of his death were 9, 6 and 1 year old respectively. His brother, Japhet Masya (PW1), and other relatives have been helping the family with school fees and living expenses for the family.

27. In the plaint, the plaintiff also asserted that the deceased’s mother, Njetita Kathini Masya was a dependant. However, there was no evidence availed to that effect, and nothing further need be said about that issue.

28. At the time of his death, the deceased was working with Kenya Prisons as a warder. It was demonstrated that his net salary was Kshs 10,739/=. This is the multiplicand under the Fatal Accidents Act. The evidence was that the deceased was the sole bread winner, and his wife was a housewife and subsistence farmer.

29. It is usual to calculate the dependency on the basis that a person would expend about 2/3rds of his salary on the upkeep of his dependants. However, as was well stated by Ringera, J (as he then was) in **Beatrice Wangui Mairu v Hon Ezekiel Barngetuny & Another Nairobi HCCC No 1438 of 1990:**

“..... there is no line of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.”

30. As is clear from the evidence analysed above, the deceased was the sole breadwinner of the family, and they depended entirely on him. I would calculate the loss of dependency on the basis that at the age of 33, the deceased would likely have served in the Kenya Prison service until retirement at the age 55 years, the age –stated in the **Leonard Ekisa case** – as the retirement age for public servants. This gives a multiplier of 22 years. There is no specific evidence of the amount that the deceased spent on his dependants and I am satisfied that it would have been in the regular region of two-thirds (2/3).

Accordingly, the loss of dependency would be $10,739 \times 12 \times 22 = 2,835,096/=$.

2/3 of the said amount would be Kshs 1,890,064/=, and I will award that sum.

Disposition

31. As against the two defendants, liability attaches in the ratio of 90%:10% in accordance with the court’s determination. I find liability against them jointly.

32. Given all the foregoing, I enter judgment as against the defendants jointly and severally in the following terms:

a) Special damages	Kshs.	41,770.00
b) General damages- Under the Law Reform Act:		
i. For pain and suffering	Kshs.	40,000.00
ii. For loss of expectation of life	Kshs.	100,000.00
c) Under the Fatal Accidents Act a sum of	Kshs.	1, 890,064.00
Total sum awarded at 100%:	Khs.	2,071,834.00
Less 10% contribution	Kshs	207,183.40
Total award	Kshs	1,864, 650.60

33. Applying the liability ratio determined, the plaintiff will be entitled to 90% of the total sum awarded or **Kshs 1,864,650.60** with interest at court rates from the date of this judgment until payment in full.

34. The plaintiff shall have the costs of the suit.

Orders accordingly.

Dated and Delivered at Nairobi this 29th Day of January, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Naima for the Plaintiff
2. Kounah holding brief for Abincha for the Defendant

Court Clerk: Mr. Adika