



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 107 OF 2007

VISCARD KIPNGETICH (Suing as personal

representative of the estate of RONO PRISCAH CHEPKEMOI.....PLAINTIFF

VERSUS

MATUNDA FRUITS BUS SERVICES LTD.....1ST DEFENDANT

NYANGA KIRONGA.....2ND DEFENDANT

MAX TRANSPORTERS.....3RD DEFENDANT

LAWRENCE MURIUKI THIONGO.....4TH DEFENDANT

RAHEEM KASAM JUNEJA..... 5TH DEFENDANT

JUDGMENT

The cause of action arose from road traffic accident that occurred on 9th December 2006 along Nakuru – Eldoret road. The deceased was travelling in a vehicle registration number KAW 172D which collided with Motor Vehicle Registration No. KAQ 744 G/ZC 0817. As a result of the accident, the deceased sustained fatal injuries which resulted in the deceased's death.

PLAINTIFF'S CASE

The plaintiff submitted that the collision that resulted in the death of the deceased was as a result of the negligence of the 2nd and 4th defendants and vicariously, the 1st and 3rd defendants.

Eliza Chelakam Kelio Lotam, an eyewitness testified that she was a passenger on motor vehicle Registration No. KAW 172D. The driver was over speeding and at Kereita or thereabout he swerved to avoid colliding into an oncoming vehicle KAP 388A/ZC 4638 but in vain as the two motor vehicles collided. She blames the driver of KAW 172D.

DW1 and 2 testified that the driver of KAW swerved to avoid an oncoming vehicle and collided with vehicle registration no. KAQ 744 G/ZC which had been carelessly parked hence the occurrence of the accident. The plaintiff relied on the case of Embu Public Road Services Ltd. Vs RIIMI EALR [1968] on the doctrine of res ipsa loquitur.

The plaintiff further submitted that the 2nd and 4th Defendants ought to have been careful while driving along the road to avoid causing accident.

On quantum, the plaintiffs submitted under the following heads of damages under the Law Reform Act;

(a) Pain and Suffering

The deceased died on 9th December 2006 at Eldoret road near Kereita farm as a result of destruction of the skull with ejection of the brain, fracture of facial bones, ribs, sternum, humerus fracture-dislocation of knee joints, tibia fibula laceration in a fatal road accident. She must have suffered great pain and the plaintiffs further submitted that the court should award kshs. 150,000/- to the estate.

The plaintiff relied on the case of Teresia Njeri (Suing as administrator and legal representative of the late Peter Ndachu Muriuki) versus

Kenya Breweries Ltd & Domina Wanjama – HCCC No. 357 of 1997 where general damages for pain and suffering under this head was assessed at Kshs. 75,000/- 20 years ago.

(b) Loss of expectation of life

The deceased was 31 years at the time of death as confirmed by the death certificate P-Exh 2. The plaintiff prayed for an award of kshs. 200,000/-

under this head and relied on the case of Alice O. Alukwa v Akamba Public Road Services Ltd. & 3 others (2013) eKLR where the court awarded kshs. 100,000/- was awarded to a deceased who died at 24 years of age.

(c) Funeral Expenses

The Plaintiff pleaded kshs. 40,000/- as funeral expenses proved by exhibits 10a-e. the plaintiff further pleaded kshs. 1,070/- as fees for application of grant ad litem.

(d) Loss of Consortium and Servitium

The deceased was married to the plaintiff and therefore the plaintiff has suffered loss of consortium and servitium. The plaintiff prayed for damages of kshs. 200,000/- in general damages. He relied on the case of Petrolina Chepngetich Kirui (Suing as the personal representative of the estate of Reuben Kipsigei Tonui (Deceased) v The A.G and Charles Kurgat.

Under the Fatal Accidents Act the plaintiff submitted under the following heads as follows:

a) General Damages for Loss of Dependency

The deceased was 31 years old earning a salary of kshs. 37,370/ per month as a nurse and would have engaged in gainful employment for 29 years.

The deceased was survived by her husband and 2 children. She would spend 2/3 of her salary on living expenses and they have lost their means of support. The plaintiff proposed a multiplier of 29 years be adopted.

Kshs. 37,370/- x 29 years' x 2/3 = kshs. 8,669,840/-

The plaintiff claims a total of kshs. 9,262,110/=.

1ST AND 2ND DEFENDANTS' CASE

The 1st and 2nd defendants submitted that the accident was caused by the negligence of the driver of KAQ 744G/ZC0817 based on the testimony of PW2, PW4, DW1, DW2, DW3 and DW4.

LW2 was the investigating officer and he visited the scene and drew sketch maps and after thorough investigation preferred charges of causing death by obstruction against the lorry driver who was convicted and fined kshs. 15,000/- this was corroborated by the production of the traffic court file by PW3 as P-Exh 13.

DW1, a passenger in the bus and DW4, the driver, tendered evidence as eye witnesses in the traffic case hence the court arrived at a conviction.

PW2 produced copies of the sketch plan and police file as P-Exh 12 before

the court. He further testified in cross exam that there were no warning signs on the road to show that the lorry was parked on the road and further confirmed that the chevrons were faded and covered by canvas. There was not enough space where the lorry could have been parked off the road.

PW4's evidence was not corroborated and there was no other independent evidence that the bus driver was driving at an excessive speed. DW1,2 and 4 tendered evidence which was corroborative and confirmed the oncoming lorry which had full lights before the collision. During cross examination PW4 confirmed that she did not mention whether the driver received a call telling him to drive faster. The defendants submitted that the oral evidence was made to blame the 1st and 2nd defendants.

It was clear that the driver took reasonable steps to avoid the accident and the distance was too short. The accident was caused by the negligence of the 4th defendant who failed to park the lorry at a safe place. The 3rd defendant is vicariously liable for the acts of the 4th defendant, his driver.

The 3rd and 4th defendants did not call any witness to shift liability to the 1st and 2nd defendants. They produced an investigation report which was scanty which blamed the bus driver for the accident. The bus driver was not charged for the offence of careless driving and the report cannot be used to override the findings of independent

eyewitnesses who even testified in the traffic case where the 4th defendant was convicted based on that evidence. The 3rd and 4th defendants are 100% liable.

The defendants cited Section 53(2) of the Traffic Act, Cap 403. Further, that it was the duty of the 3rd and 4th defendants to table evidence to rebut that advanced by the 1st and 2nd defendants which they failed to do. The 4th defendant was convicted and there is no evidence of an appeal. The 1st and 2nd defendants have failed to prove their cases on a balance of probability.

On Quantum they submitted that for pain and suffering kshs. 10,000/- will be adequate compensation, for loss of expectation of life they submitted that kshs. 80,000/- would suffice. These were the proposed damages under the Law Reform Act.

On dependency ration they submitted that PW1 did not indicate to what extent he depended on PW1. Further, that it cannot be an accurate assumption that 2/3 of her income was always available as family expenses.

They submitted a ratio of 1/3 be adopted. They relied on the case of Leonard O. Ekisa v major K Birgen (2005) eKLR.

The defendants submitted that it was not specifically pleaded where the deceased was categorically working and that PW1 could not confirm the amount the deceased earned consistently in cross examination. He stated that the deceased's basic pay was kshs. 20,000/ and therefore the defendants proposed a multiplicand of kshs. 20,000/-.

The defendants submitted that the plaintiffs did not produce the receipts for grant of letters of administration, police abstract, coffin, funeral expenses and burial gown. Therefore, the court should award only the strictly proven special damages.

4TH AND 5TH DEFENDANTS CASE

The defendants phrased their issues for determination and submitted on them. They raised the issue of whether a conviction in a criminal case amounts to admission of liability in a civil case. They opposed the assertion that the driver charged and convicted should be held 100% liable for the accidents since the standards of proof differed.

They relied on the cases of Henry Mwobobia vs Muthaura Karauri & Another HCCC No. 104 of 1991 and Veronica Kanorio Sabari v Chinese technical Team for Kenya National Sports & 2 others HCCC No. 376 of 1998. They further submitted that the court ought to disregard the conviction of the driver and examine the evidence as a whole on a balance of probabilities.

They relied on the testimony of PW4 and DW5 in submitting that the driver was driving at a high speed and could not avoid hitting the parked lorry. They further submitted that the driver was negligent and had he been driving at the required speed he would have noticed the stalled vehicle parked on the side of the road as indicated by PW4.

Based on PW2's cross examination they submitted that the lights of the oncoming vehicle would have affected the driver thus causing the accident when the vehicle with full lights attempted to warn him. They relied on their investigation report from the private investigator as proof that there were warning signs on the road.

They submitted that they could not be held liable as no proof of liability was established by the 1st and 2nd defendants imputing negligence on them.

On Quantum, the defendants submitted a sum of kshs. 10,000/- would be sufficient. Under loss of life they submitted that kshs. 100,000/- was sufficient. Under the Fatal Accidents Act they submitted that a multiplicand of 20 years be adopted and the compensation under this head be kshs. 1,600,000/-.

On special damages the plaintiff produced exhibits 10a-e showing that they spent kshs. 37,876/- which the plaintiff is entitled to.

On loss of consortium and servitium they submitted kshs. 100,000/- would be sufficient compensation. The total damages suggested by the defendant's amounts to kshs. 1,847,876/-.

ISSUES FOR DETERMINATION

- a) Whether a Conviction in a criminal case amounts to liability in a civil case.
- b) Liability
- c) Quantum

WHETHER A CONVICTION IN A CRIMINAL CASE AMOUNTS TO LIABILITY IN A CIVIL CASE.

In Lilian Birir & another v Ambrose Leamon [2016] eKLR the court held;

The standard of proof in criminal cases is slightly higher than of civil cases, and in particular in traffic cases. The acquittal

or conviction in a traffic case, in my considered view, cannot be a bar to a prosecution in a civil case on a claim for damages and the court is not bound to follow the investigating officer's opinion in reaching its decision in a civil claim...

I have stated that in my view which has been the view of other courts, that a conviction in a traffic offence alone is not sufficient without further evidence to hold the respondent liable or culpable. There must be evidence by the appellant to show why and how the respondent is culpable. Mere statements are not enough.

From the foregoing it is evident that the conviction in the traffic case does not automatically result in the defendant(s) being held liable, but is a relevant issue for consideration in determination of liability.

LIABILITY

In order to determine liability, the court needs to go into the evidence adduced in the matter.

The evidence by PW2 was that the lorry KAQ 744G had been parked on the side of the road and the chevrons had been covered by canvas. The chevrons were small in size and faded as per the inspection report. There were no life savers or tree branches placed on the road. There were spaces on the road where the lorry could have been parked with enough space but at the point of the accident there was no enough space. He also produced sketch maps of the accident site.

PW4's evidence was uncorroborated and was inconsistent in court when compared with her statement. She could not see the speedometer and she did not see an oncoming vehicle. She could not tell if the driver was asleep. DW1, DW2, DW3 and DW4's evidence was that the lorry was partly on the road. They corroborated each other's testimony on the positioning of the lorry. They also corroborated the evidence that the oncoming vehicle had full lights which caused a visibility problem. In general, their evidence was corroborated thus more credible than PW4's evidence.

The 4th and 5th defendants never called any witnesses but produced an investigation report by Daureb Insurance Assessors as D-Exh 1.

PW2 corroborated the evidence of DW4 that there were no warning signs on the road.

From the evidence of the witnesses it is apparent that the driver took the steps he could to avoid the collision upon being blinded by the oncoming vehicle's headlights. It is also apparent that the truck was parked partly on the road and had no lifesaver signs or branches to warn drivers. Further, that the chevrons were covered and not visible.

The 4th and 5th defendants maintained that the vehicle was seen at a distance of 50 meters by passengers but did not produce any witness who corroborated the testimony of PW4. Further, that the driver had admitted that his vehicle had not been able to illuminate more than 50 meters ahead yet traffic rules require the vehicle to be able to illuminate 100 meters ahead. However, there was no report submitted to prove this defect and the investigating officer testified that the vehicle had no pre-accident defects.

Based on the evidence adduced I do find that the 4th and 5th defendants are liable for the accident. They failed to prove that the driver was over speeding or that he was liable. On their part, the evidence is clear on their

negligent acts that resulted in the accident. Had the lorry not been parked at that point and had there been warning signs or proper chevrons the accident could have had a better chance of being avoided. The time of the accident and the weather conditions being foggy could also have contributed to the accident due to poor visibility.

I therefore find the 4th and 5th defendants jointly and severally 100% liable for the said accident and the 1st, 2nd and 3rd defendants unliable.

QUANTUM

Under the Law Reform Act, the courts have awarded damages under the following heads as follows;

a) Pain and suffering

In *Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others [2014] eKLR* the court awarded kshs. 10,000/- as damages.

In *Put Sarajevo Gen. Eng. Co. Ltd v Esther W. Njeri & Johnson Mwangi Gucha (Suing as the Legal Representative of the Estate of Sylvester Muhia Gucha (Deceased))* where the deceased died on the spot the court held;

As for damages for pain and suffering the judges in the Kemfro Africa Ltd case (ibid) were clear that such an award could not be sustained where the deceased succumbed to his injuries on the spot. In the leading judgment, Kneller J.A. said at page 730: -

“In England, under the Law Reform Act, it is the deceased's own cause which survives for the benefit of his estate...so the estate should recover the damages the deceased would have recovered but for his death (and the expenses of his funeral). Damages for pain, suffering, loss of amenities and earnings are for the period he survived...so if death is more or less instantaneous the only damages recoverable will be for the deceased's loss expectation of life.”

In Charles Masoso Barasa & another v Chepkoech Rotich & another [2014] eKLR the court awarded kshs. 15,000/- under this head as the deceased died a few hours after the accident.

In Henry Omweri Oroo & another v Samuel Mungia Kahiga & another [2016] eKLR the court held;

Under the Law Reform Act, I have considered the proposed awards by both counsel, and authorities in support. The deceased died on the spot. He had no awareness of pain and suffering before he succumbed to the injuries I shall award a NIL damages on this sub-head.

Given that none of the parties have contested that the deceased underwent pain and suffering before death, I propose an award of kshs. 15,000/- under this head.

b) Loss of expectation of life

In Hyder Nthenya Musili & another v China Wu Yi Limited & another [2017] eKLR the court awarded kshs. 100,000/- as damages for loss of expectation of life.

In Put Sarajevo Gen. Eng. Co. Ltd v Esther W. Njeri & Johnson Mwangi Gucha (Suing as the Legal Representative of the Estate of Sylvester Muhia Gucha (Deceased)) the court awarded kshs. 100,000/- as damages for loss of expectation of life.

The conventional award for damages under this head is kshs. 100,000/-. I propose the court award kshs. 100,000/-

(c) Funeral expenses

The Court of Appeal in the case of Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR, held inter alia:

"We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs. 117,325/= awarded by the learned trial Judge as "funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs. 60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs. 60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs. 60,000/= we have awarded herein apply strictly to the circumstances of this case."

In Ali Sheikh Ahmed & another v N K J & another (Suing on their own behalf and in their capacity as the administrators of the estate of the late J M J) [2017] eKLR the court cited the above decision and interpreted it as follows;

My understanding of the above decision is that an award for funeral expenses can be made even in the absence of receipts to support the fact that such expenses were incurred, as long as the amount awarded is reasonable.

In the circumstances I find that the plaintiff's proposed amount is reasonable and propose the award of kshs. 41,070/- as damages.

c) Loss of Consortium and Servitium

In Alex Otieno Amolo & another v Hayer Bishan Singh & Sons Limited [2016] eKLR the court awarded kshs. 100,000/- as damages for loss of consortium.

In Paul Kioko v Samuel G. Karinga & 2 others [2012] eKLR the court awarded kshs. 100,000/- as damages for loss of consortium.

The conventional award under this head is kshs. 100,000/- and I therefore propose the award follow suit.

Under the fatal accidents act damages have been awarded as follows;

a) General damages for loss of dependency

The deceased was married and survived by her husband and 2 children. She was 31 years old and earned a salary of kshs. 37,370/- evidenced by the payslip produced as P-Exh 8. After tax she earned kshs. 31,681/- and this is the appropriate multiplicand. She was a nurse and would have engaged in gainful employment for 29 years. I find that a multiplier of 29 years is reasonable and a dependency ratio of 2/3 to be reasonable.

Kshs. 31,681 x 12 months x 29 years x 2/3 = 3,674,996

(b) Special damages

The plaintiff also claimed kshs. 1,200 for special damages. The plaintiff has not specified what these entail and neither have they submitted on the same but from the plaint it is plausible that these are for the police abstract and records. It is trite law that special damages must be

specifically pleaded and proved. No receipts have been provided but the documents could not have been obtained without payment and I therefore award kshs. 1,200/-

In all I do adjust the award of damages in favour of the plaintiff as follows;

i) Pain and suffering.....kshs. 15,000/-

ii) Loss of Expectation of life..... kshs. 100,000/-

iii) Funeral Expenses..... kshs. 40,000/-

iv) Application for Grant..... kshs. 1,070/-

v) Loss of Consortium and Servitium.... kshs. 100,000/-

vi) Loss of dependency..... kshs. 7,349,992/-

vii) Special damages..... kshs. 1,200/-

TOTAL..... kshs. 7,607,262

I find for the plaintiff as against the 4th and 5th defendants and award a total sum of kshs. 7,607,262/-. Each party to bear their own costs.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of May, 2019

In the presence of:

Ms Anguko for 1st and 2nd defendants

And absence of Ms Ochieng for plaintiff

Ms. Sarah – Court assistant