



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 345 OF 2013

KIOKO KILONZO (*suing as the Administrator of estate the late*

BENSON MATATA KILONZO(Deceased).....**PLAINTIFF**

VERSUS

BAHARI FORWARDERS LIMITED.....**1ST DEFENDANT**

BONIFACE MUTHEU NTHUKU.....**2ND DEFENDANT**

JUDGMENT

The Plaintiff herein, Kioko Kilonzo, is the Administrator of the Estate of the late BENSON MATATA KILONZO (Deceased) who has sued the Defendants claiming General damages under Fatal Accidents and Law Reform Acts, special damages in the sum of Kshs. 658,075.00cts, interest and costs of the suit following a Road Traffic Accident that occurred on the 20th day of July, 2012.

The 1st Defendant is a limited liability company and was at all material times relevant to this case, the registered owner of motor vehicle registration number KBN 349P ZD5292 while the 2nd Defendant was the beneficial owner and/or the authorized driver, employee, servant and/or agent of the 1st Defendant and who was driving the aforesaid motor vehicle at the time of the accident

The Plaintiff avers that on 20th July, 2012, the deceased was a lawful pedestrian along Nairobi-Mombasa road near “DC’s” office when, the 2nd Defendant negligently drove and /or controlled motor vehicle KBN 349P ZD5292 that he caused it to hit the deceased as a result of which he sustained fatal injuries by reason of which his estate and Dependants have suffered loss and damage. The particulars of negligence are set out in paragraph 6 of the plaint.

The Plaintiff further contend that, in the alternative and without prejudice to the above, the accident was caused directly by negligence on the part of the 1st Defendant in engaging an unqualified servant or agent being the 2nd Defendant to drive/or handle and manage the said vehicle. The plaintiff has also relied on the doctrine of Res Ipsa Loquitor and Vicarious Liability.

The loss suffered by the estate and the particulars pursuant to the statute are set in paragraph 10 of the plaint.

The defendants filed a joint statement of defence on the 17th April, 2014 in which they have denied the claim. The 1st Defendant has denied being the registered owner of the aforesaid motor vehicle and the 2nd Defendant has denied being the beneficial owner and/or authorized driver or employee of the 1st Defendant and has put the Plaintiff to strict proof. They have also denied the occurrence of the accident and the particulars of negligence attributed to the 2nd Defendant. The 1st Defendant further denies that it’s vicariously liable for the said accident.

In the alternative and without prejudice, the Defendants aver that, if the accident occurred which is denied, the same was wholly caused or substantially contributed to, by negligence on the part of the deceased. The particulars of negligence are pleaded in paragraph 6 of the defence. The Defendants further deny that the doctrine of Res Ipsa Loquitor is applicable in this claim.

In the further alternative and without prejudice, the Defendants aver that if the alleged accident occurred, but which is denied, the same was inevitable and it occurred despite the exercise of reasonable skill and due care on the part of the driver thereof. The particulars of special damages, loss and damage are denied and those pursuant to the statutes are also denied.

A reply to Defence was filed on 27th day of May, 2014 in which, the plaintiff joins issues with the Defendants in their defence save where the same consists of admissions. He has reiterated the contents of the entire plaint in reply thereof.

At the hearing, the Plaintiff who is a brother to the deceased testified as PW1 and called two witnesses in support of his case. It was his

evidence that he was called in the morning of 20th July, 2012, at 8.00am and was informed about his late brother's involvement in the accident which occurred along Nairobi - Mombasa road near "DC's office".

Chief Inspector Julius Kipkoech gave evidence as PW2. He confirmed the occurrence of the accident involving motor vehicle KBN 349P ZD5292 and the deceased, which occurred on the 20th day of July, 2012. He stated that the police visited the scene and according to their report, the deceased was using a mobile phone as he crossed the road and he was not able to see motor vehicle KBN 349 ZD5292 as a consequence of which, he was hit. It was his further evidence that according to the sketch plan, the deceased was hit on the lane for vehicles driving from Mombasa as he was crossing the road. That was the lane that the subject vehicle was using. He died on the spot.

He blamed the deceased for the accident for using his phone while crossing the road. No charges were preferred against the driver of the vehicle that hit the deceased and no inquest was done. In his professional opinion, the accident was caused by negligence on the part of the deceased.

Michael Kilonzi testified as PW3. He is a conductor for a vehicle plying Mombasa-Nairobi road. At the material time, he owned a Kiosk where he was carrying business of selling food. It was his evidence that on the 20th July, 2012, the deceased in this case went to his kiosk to buy cigarettes but he did not have them in his stock. They came out together from the kiosk and the deceased safely crossed the Mombasa-Nairobi road. According to him the deceased was hit while at the bus stop. He blamed the driver of the trailer for the accident for failing to hoot or slow down to avoid the accident.

In cross examination, he stated that the deceased did not use his mobile phone while crossing the road but was hit while at the bus stop and he is the only one who was hit though there were other people at the stage. In cross examination, it was his evidence that the deceased was hit on the left side as one drives to Nairobi.

The Defendants called one witness in support of their case, Boniface Mutheu Nthuku. He stated that he was driving motor vehicle KBN 349P ZD 5292 from Mombasa to Nairobi when the accident occurred. It was his evidence that the deceased was crossing the road while talking on phone and he did not check to see if there was oncoming traffic and hence the accident. That he was driving at 30km/h but he could not avoid the accident as the deceased's movements were erratic and he could not have swerved on either sides of the road due to the heavy traffic at the material time. He blamed the deceased for the accident and he stated that the deceased was careless in the manner in which he was crossing the road.

It was his further evidence that the point of impact was on the left side of the road as one heads to Nairobi and not off the road. He denied that he was driving at a high speed as alleged or that he was driving in a zigzag manner.

Parties filed written submissions in support of their respective cases.

This being a road traffic accident, the only two issues for determination are;

1. Liability
2. Quantum of damages.

The court has considered the evidence on record, the pleadings and the submissions by the parties.

On the issue of liability, the Plaintiff has urged the court to find the second Defendant liable for causing the death of the deceased by driving at a speed that was excessive in the circumstances of this case, driving without due care and attention and for failing to have any sufficient regard for the safety of other road users and in particular, the deceased. It was also submitted that the 2nd Defendant failed to stop, slow down, swerve or in any other way manage the motor vehicle so as to avoid the accident. That he careless veered off the rightful lane of the vehicle and encroached onto the pedestrian walking path thereby causing his vehicle to hit the deceased. He asked the court to find the 2nd Defendant 100% to blame for the accident.

On the part of the Defendants, it was submitted that the Plaintiff did not prove his case on a balance of probability. They cited the case of Patrick M. Were vs. Kenya Power and Lighting Company Ltd (2014) eKLR which referred to the case of Amalgamated Saw Mills Limited Vs. Stephen Muturi Nguru HCA 75/2005 in which Musinga J. Stated thus;

“Revisiting the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must proof a casual link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable.”

The case of Gideon K. Kemobi vs. Nyayo Tea Zone Development Corporation (2015) eKLR was also relied on, in which the court dismissed the case for failure on the part of the Plaintiff to proof the case on a balance of probability; in addition the Defendant cited the case of M'Mbua Charles Mwalimu vs. Coast Broadway Company Limited (2012) eKLR where the court dismissed the Plaintiffs case for failure to demonstrate any evidence in support of the allegations of particulars of negligence as pleaded in the plaint.

They further submitted that the accident was wholly caused by the Plaintiff for his failure to obey the traffic rules while walking along the said road and in particular for crossing the road while using his mobile phone.

On this issue of liability, the evidence of PW2 and PW3 is very material. Both witnesses testified in support of the Plaintiff's case and it's

interesting to note that their evidence was full of material contradictions.

According to PW2, who is a police officer, the deceased was to blame for the accident. The accident occurred on the left lane as one drives from Mombasa to Nairobi. The evidence of PW2 is supported by that of DW1 to the effect that the deceased was crossing the road and he was talking on his mobile phone. PW2 stated that according to the sketch plan taken at the scene of the accident it occurred on the left side of the road as one drives from Mombasa to Nairobi which was the lane that DW1 was using on the material day. PW2 further testified that, the deceased was hit while crossing the road from left to right as one faces Nairobi direction. The evidence agrees with that of DW1 who was the driver of the subject motor vehicle at the material time.

The police blamed the deceased for the accident and the driver of the vehicle was not charged with any traffic offence as evidenced by a copy of the police abstract that was produced in evidence. In his evidence, PW3 stated that the deceased was hit while at the bus stop. He stated that there were other people at the same bus stop but it was only the deceased who was hit. This in my view is not a likely scenario contrary to what the witness would like this court to believe. If there were other people, the most probable thing would have been that some would have been injured or even sustained fatal injuries. In any event, in cross examination, the same witness admitted that the deceased was hit on the left side of the road as one heads to Nairobi from Mombasa. His evidence was full of contradictions and I find him an unreliable witness.

The evidence in support of the plaintiff's case is contradictory. This court believes the evidence of PW2 and that of DW1 on how the accident occurred. The court notes that PW2, is a police officer who did not investigate the accident but his evidence was based on the record as captured in the OB by the officer who investigated the accident in the year 2012. PW2 did not have any interest in the case and could not have had any reason to tell lies. In the circumstances, and going by the evidence on record, I find the deceased was fully to blame for the accident. I hereby dismiss the case as the same was not proved on a balance of probability.

The court is enjoined to assess the quantum of damages that it could have awarded had the Plaintiff succeeded. I have looked at the submissions made by both parties in that regard. The Plaintiff testified that the deceased was aged 31 years at the time of his death, he was a farmer earning a cumulative wage of Kshs. 400,000/- per month or more. Though he was not married, his dependants are said to be his parents and a brother. The Plaintiff has urged the court to adopt a multiplier of 20 years and a multiplicand of Kshs. 200,000.

He has relied on the case of *Loise Wairimu Mwangi and Samuel Ndung'u Muiruri (suing as legal representatives of the estate of James M. Ndungu (deceased) Vs. Joseph Wambue Kamau* where a multiplier of 20 years was adopted for deceased who died aged 25 years.

As for the special damages, the court was urged to award the claimed sum of Kshs. 658,075cts as per the receipts produced in court.

For pain and suffering the Plaintiff submitted that a sum of Kshs. 250,000/- would be reasonable to compensate the estate of the deceased. He relied on the case of *Douglas Ooga Nyansimora (suing as the administrator of the estate of Janet Kerubo Nyansimora (deceased) Vs. Sammy Mutunga Makau & Christine Owour* where the court awarded Kshs. 150,000 for pain and suffering.

For loss of expectation of life, the Plaintiff urged the court to make an award of Kshs. 300,000 relying on case of *Patrick Kanai Waweru (suing as the Legal Administrator of the estate of Grace Njoki Kanai vs. George Ogwella, All Dean Satellite Network Limited & George Ochullo Ayako Civil Suit No. 5/2012* where a sum of Kshs. 200,000 was awarded for a deceased who was aged 34 years.

On the part of the Defendants, on pain and suffering, a sum of Kshs. 10,000/- was suggested for the reason that the deceased in this matter died on the spot. The case of *Kenya Railways Corporation Vs. Samuel Mugwe Gioche (2012)eKLR* was cited where a similar sum was awarded.

On loss of expectation of life, a sum of Kshs. 60,000 was proposed. The case of *Joseph Kahiga Gathii & Paul Mithaiya Kahiga (suing as the Administrators of the Estate of the late Lydia Wanjiku Kahig & Elizabeth Murugi Kahiga (deceased) Vs. World Vision Kenya & 2 others (2014) eKLR* in which Kshs. 60,000 was awarded was cited.

Under the Fatal Accident Act, the court was urged to apply Kshs. 9,371 being the minimum wage in the year 2012 as no books of accounts, bank statements, KRA returns were produced as evidence. They have argued that the sum of Kshs. 400,000 claimed by the plaintiffs was not supported by evidence. On the multiplier, they have proposed a multiplier of 10 years and have argued that there was no evidence that the deceased was in good health and that he lived a fruitful life prior to his untimely death. On the dependency ratio, they suggested 1/3 based on the fact that the deceased was not married and had no children prior to his death. They cited the case of *Sukari Industries Limited vs. John Osodo Osee (suing as administrators of the estate of Wycliffe Ouma Osodo (deceased) 2015 eKLR* where the court adopted the same ratio.

The Defendants have further urged the court to take into account the principle of Doubt Enrichment under the Fatal Accidents Act and the Law Reform. The case of *Maina Kaniaru vs. Joseph Muriuki Civil Appeal NO. 14 of 1989* was relied on and that of *Davies & another vs. Powell Duffryn Association Colliers Ltd* among others.

The Defendant also took issue with the production of receipts in support of special damages and submitted that Section 19(1) was not complied with. The case of *S. D. Transami K. Limited vs Scholastica Nyambura (2012) eKLR* was relied on.

The court has considered the submissions with regard to the quantum of damages.

On pain and suffering, this court would have awarded Kshs. 20,000/- as a reasonable amount considering that the deceased died on the spot.

On loss of expectation of life, having regard to the age of the deceased, it is my considered view that a sum of Kshs. 120,000/- would have been reasonable.

On loss of dependency, the Plaintiff has urged the court to apply a multiplicand of Kshs. 200,000. The court notes that there is no evidence to support the same. I am persuaded by the submissions by the defendants that in absence of such proof, the only way to go is to apply the minimum wage of Kshs. 9,371 as at 2012. The 1/3 ratio is reasonable and the court adopts the same.

On the multiplier, the court applies the 25 years suggested by the Plaintiff as it is reasonable.

In the end, judgment would have been entered for the Plaintiff against the Defendants as follows;

1. Pain and suffering Kshs. 20,000/-
2. Loss of Expectation of life Kshs. 120,000/-
3. Loss of dependency Kshs. 937,300/-.
4. Special damages – 658, 075/-

Total 1,737,375/-.

On the issue of production of receipts without Revenue Stamp, the court finds that no objection was raised by the Defendant to the production of the same during the hearing. As it stand now, they are already exhibits and the issue was made too late in the day.

Dated, Signed and Delivered at Nairobi this **20TH** Day of **JUNE, 2019**.

L. NJUGUNA

JUDGE

In the Presence of

.....*For the Plaintiffs/Applicants*

.....*For the Defendant/Respondent*