



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 264 OF 2013

VERONICA NJERI KIOI & ANOTHER.....PLAINTIFF

VERSUS

MARY NZEKI..... DEFENDANT

J U D G M E N T

The plaintiff's who are the Administrators of the estate of the late Peter Thuo Ndirai filed the plaint dated 1st July, 2013 in which they have claimed both general and special damages plus the costs of the suit.

The cause of action arose from a Road Traffic Accident which occurred on 16th September, 2011 along Mombasa - Nairobi Road involving motor vehicle registration number KBB 432G and the deceased, the late Peter Thuo Ndirai.

The plaintiffs pleaded that on the said date, motor vehicle KBB 432G which is registered in the name of the defendant was being driven along Mombasa - Nairobi Road, when the driver lost control of it, veered off the road and knocked down the deceased, who died as a result of the injuries that he sustained.

The Plaintiffs contend that the accident was solely caused by negligence on the part of the defendant's driver and/or agent and have set out the particulars of negligence in paragraph 5 of the plaint while those of general and special damages are set out in paragraph 7 thereof. The plaintiffs have also invoked the doctrine of Res Ipsa Loquitur in paragraph 6 of the plaint.

In her defence filed on the 25th September, 2013, the Defendant denied the claim. She denied the allegation that she was the registered owner of the said vehicle at the material time of the accident and also that the deceased was off the road at the material time. The particulars of negligence have also been denied.

Further and without prejudice to the foregoing, the Defendant avers that an accident occurred on 16th September, 2011, but not in the manner described in the plaint. She avers that the same was wholly caused by negligence on the part of the deceased who was the driver or loader of motor vehicle KAL 827G. The particulars of negligence on the part of the deceased and that of his loader are set out in paragraph 7 of the defence. The Defendant has also denied that the plaintiffs suffered any damage as alleged in the plaint and they are put to strict proof thereof. She has urged the court to dismiss the plaintiff's claim with costs.

At the hearing, VERONICA NJERI KIOI gave evidence as PW1. It was her evidence that the deceased was her husband having been so married under Kikuyu Customary Law. They were blessed with one child Samuel Ole Ndirai. She stated that on the 15th September, 2011, her late husband went to work in Machakos but he never returned home. He was a self employed mechanic working at Roysambu. She was called by her sister-in-law namely Mary Wangui who informed her that her husband had been involved in an accident. In the company of her sister, she went to Machakos and on arrival at the mortuary she saw the body of her late husband. She organized for the removal of the body from Machakos to Kenyatta mortuary and he was later laid to rest on the 23rd September, 2011. She produced the bundle of documents filed on 4th July, 2013 and those filed on 8th July, 2014 as exhibits in the case.

Allan Igunza Malulu testified as PW2. He adopted his witness statement filed on 4th July, 2013 as his evidence in chief. It was his evidence that on the 13th September, 2011 he hired motor vehicle registration number, KAL 827G from Peter Ndirai Thuo (the deceased) from Nairobi, to carry trappers from Emali town to Nairobi. They left Emali at around 10.00pm on the 15th September, 2011 but at around 1.30am on the 16th September 2011, the motor vehicle developed mechanical problems and the driver, one Mwangi Kamau parked it off the road on the left side hand as one faces Nairobi from Emali. They were four of them ie. the driver John Mwangi Kamau, the deceased, Humphrey Shikatwa and himself.

That Humphrey Shikatwa and himself remained in the lorry to guard the same while the driver and the deceased lit a fire outside as it was cold. They lit the fire 6 meters from where their lorry was and covered themselves with a tent and slept. At around 5.30pm, he saw a lorry from Mombasa direction which had lost control and was being driven very fast on the left side of their vehicle, it passed over where their

driver and the deceased were sleeping. He stopped the driver of the lorry and informed him that he had knocked some people. He called the police who went to the scene and they took the deceased and the driver to Machakos General Hospital but they were pronounced dead on arrival. According to him, he blamed the driver of the motor vehicle KBB 432G for driving the said motor vehicle at a high speed, carelessly and negligently without proper look out.

The defendant did not call any witness to support her case.

Parties filed written submissions in support of their respective cases.

The matter herein revolves around the issue of liability and quantum of damages. In their submissions, the plaintiffs submitted that the defendant's driver and or agent was negligent under the doctrine of Res Ipsa Loquitur.

They urged the court to infer negligence on the part of the defendant's driver from the circumstances in which the accident occurred by invoking the principle of Res Ipsa Loquitur. The court was referred to the book of Winfield F Jolowicz on Tort 17th edition where the learned author wrote;

“This has traditionally been described by the phrase Res Ipsa Loquitur the thing speaks for itself..... Its nature was admirably put by Morris L. J. when he stated that,

“It poses no magic qualities nor has it any added virtue, other than that of brevity, merely because it is expressed in latin. When used on behalf of a plaintiff it is generally a short way of saying.

“I submit that the facts and the circumstances which I have proved establish a prima facie case of negligence against the defendant.....

There are certain happenings that do not normally occur in the absence of negligence and upon proof of these, a court will probably hold that there is a case to answer. They cited the case of **John Mutuma Ndege & another Vs. James Barabi M'Laibuta (suing as a legal representative of the Estate of Samson Mwenda (deceased) (2017) eKLR.**

The court was also referred to the case of Lydia **Kirigo Mwangi & another (administrators of John Mwangi Kamau) Vs. Peter Muli Mutuku & Another Civil Suit No. 352 of 2012** (a related matter arising from the same accident in which a Magistrate's court apportioned liability at 90% against the deceased). They urged this court to enter liability in the same percentage.

On her part, the defendant submitted that the deceased should be held liable because he slept by the road side without forewarning other motorists by placing a warning sign or even wearing a reflector jacket. It was further submitted that the deceased slept at a precarious place aware of the impending danger they were putting upon themselves and hence they should be held to have contributed to the occurrence of the accident.

The Defendant submitted that her driver was charged with offence of causing death by dangerous driving in Machakos Traffic Case No. 2492/2011 and he was acquitted as no prima facie case was established against him. The Defendant relied on the case of **Embu Public Road Service Limited Vs. Riimi (1968)EA and that of Karanja Vs. Malele (1983)KLR 147** to support her contention that her driver was not negligent. The court was asked to apportion liability at 50% against the deceased and the driver of motor vehicle KBB 432G.

The court has considered the submissions of the parties on the issue of liability, in addition to the evidence on record by PW2. The plaintiffs' have also relied on the doctrine Res Ipsa Loquitur.

From the evidence on record, it is not disputed that the accident occurred on 16th September, 2011. According to PW2, their motor vehicle KAL 827G had been parked off the road after it broke down along Mombasa-Nairobi road. The deceased was not in the aforesaid vehicle but was keeping himself warm next to a fire that he had lit and was off the road. It was his further evidence that after their motor vehicle broke down, they put two reflectors one in front of the motor vehicle and the other one at the rear. That the deceased was at a distance of 6 meters from where the parked motor vehicle was, which vehicle was off the road. It was his evidence that motor vehicle KBB 432G was being driven at a high speed.

As noted elsewhere in this judgment, the defendant did not call any witnesses though she has urged the court to apportion liability at 50%, the only reason being that the defendant's driver did what any reasonable driver in his circumstances would have done to avoid hitting a stationary vehicle and hence swerved, least expecting that any reasonable man would be sleeping by the road side and covered in dark canvas.

This court is of the view that, in the absence of any evidence by the defendant, any submissions made on liability do not hold much weight. I say this because, PW2 in his evidence stated that he had placed life savers behind their vehicle and in front to warn the oncoming motorists of the stalled vehicle. This evidence was not disputed by the defendant at all. The accident occurred at around 5.30am and any driver on the road at that particular time would be expected to be extra careful as by then, it is still dark and hence, the need to drive at a reasonable speed such that in case of any in eventuality, he would effectively control his motor vehicle. In this case, PW2 stated that the driver of motor vehicle KBB 832G owned by the defendant was driving at a high speed and that could explain why he was not able to control his motor vehicle when he found the stalled lorry.

Secondly, if he was on the look out, he would have been able to notice the life savers in good time so as to slow down and safely overtake the stalled lorry. In any event, the evidence available to the court is that the vehicle was off the road.

Though the court was referred to a traffic case in which the driver of motor vehicle KBB 432G was charged, the proceedings were not annexed as an exhibit in this case for this court's perusal. The Plaintiff also invited the court to apportion liability on the basis of the findings by the lower court in CMCC No. 352/2012, which I decline to do, going by the evidence on record and my reasoning above. Going by the evidence available to this court, I find the driver of motor vehicle KBB 432G fully liable for the accident. The deceased and his driver were sleeping completely off the road and there is no evidence at all on the basis of which, this court can apportion liability to them.

On quantum of damages, the Plaintiffs testified that at the time of his death, the deceased who was aged 38 years, was a mechanic with his own garage called Pendi Auto garage and he also had lorry transport business. The Plaintiffs estimated his monthly income at Kshs. 50,000/-. The Plaintiff also stated that at the time of his death, the deceased enjoyed good health and had a promising future prospect. He would have continued to work until the age of 60 years had his life not been cut short. The Plaintiffs relied on the case of Mary Njeri Murigi Vs. Peter Macharia and another (2016)eKLR in which the court adopted the ratio decidendi in Jacob Ayiga Maruja & another vs. Simeon Obayo C/A (2005) eKLR in which the court appeal stated in part:

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents.....”

In urging the court to adopt a multiplicand of Kshs. 50,000/- the plaintiffs relied on the fact that the deceased owned a garage and that he had hired the late John Kamau at a net salary of Kshs. 39,000/-. In this regard, the judgment of the lower court in Civil Suit no. 352 of 2012 was relied on. The court was urged to adopt a multiplier of 22 years and a ratio of 2/3 because the deceased was married with a family. For pain and suffering, the court was urged to award Kshs. 20,000 and Kshs. 100,000/- for loss of expectation of life.

On the part of the defendant, it was submitted that on loss of dependency, no books of accounts were produced to prove how much the deceased was earning or to prove that the garage was still functional since it was registered in the year 2004. It was argued that loss of earnings is a special damage claim which must be specifically pleaded and strictly proved. The case of Kimatu Mbuvi & Brothers vs. Augustine Munyao Kioko (2006) eKLR in which the court of appeal quoted the case of Mwangi & Another vs. Mwangi (1996) LLR 2859 (CAK) was relied on.

In the absence of any proof that the garage was still running, the defendant urged the court to consider the deceased as a turn boy under the Labor Institutions Act for the reason that he was assisting the driver when the accident occurred. The court was asked to apply a multiplicand of Kshs. 8,193/- being monthly salary for a turn boy in the year 2011 under Regulation of Wages (General) Amendment)Order, 2011 Schedule 1, clause 2.

On the multiplier, the defendant submitted that a multiplier of 12 years would suffice as the deceased was aged 38 years at the time of the accident and based on his work environment, uncertainties and vicissitudes of life, lifestyle and genetic diseases such as cancer, hypertension among others. The case of Pauline Wambui Kirima & Another vs. Esther Wambui Njuguna (2009) eKLR was cited in which the deceased died at 41 years and the court adopted a multiplier of 10 years and that of Jacinta Wangari vs. Kenya Bus Services Limited (1996) eKLR. The defendant did not have a contestation on the ratio of 2/3 being applied by the court as submitted by the plaintiffs.

On pain and suffering the defendant urged the court to award Kshs. 10,000/- as the deceased died instantly. She relied on the case of PI Vs. Zena Flowers & Another (2015) eKLR and that of Mary Njeri Murigi vs. Peter Macharia & Another(2016)eKLR where a sum of Kshs. 10,000/- was awarded.

On loss of expectation of life, the defendant suggested a sum of Kshs. 100,000/- basing their offer on the case of Kemfro Africa Limited vs. A. M. Lubia (1982 – 85) 1KAR 727 where a similar sum was awarded.

The court has considered the submissions of the parties in regard to the quantum of damages under the various sub heads. On pain and suffering, the court notes that, the deceased did not die instantly but on arrival at Machakos District Hospital. In that case a sum of Kshs. 20,000/- submitted by the plaintiffs is reasonable and I do grant the same.

On loss of expectation of life, both the plaintiffs and the defendant seem to be in agreement on a sum of Kshs. 100,000/-. I do grant the same.

On loss of dependency, I note that a certificate of registration of a garage was produced in evidence and the court was told that the deceased was a mechanic. I am not persuaded by the defendant's submission that this court should treat him as a loader and apply the minimum wages for a loader as at the time. On the other hand, though the plaintiffs have submitted that he was earning a net of Kshs. 50,000/-, no statement of accounts or at least some other form of evidence to support that contention were produced. It has been submitted that he had employed the late John Kamau at a salary of Kshs. 39,000/. No such evidence was available in this case to that effect. In view of the foregoing, this court would have no basis to adopt a multiplicand of Kshs. 50,000/- but since there is evidence that the deceased was a mechanic, my considered view is that the court should apply the minimum wage of a mechanic in the year 2011 which was 9,815/-.

For the multiplier, the deceased was in private employment and not bound by the official retirement age of civil servants. He would have worked even beyond the 60years which is official retirement age. But considering the nature of his work and the vicissitudes of life, a multiplier of 20 years is reasonable.

On the ratio, both parties are in agreement on a 2/3 ratio which I hereby adopt.

On special damages, a total of Kshs. 171,300/- has been claimed in the plaint. (See paragraph 7). It is trite law that special damages have to be specifically pleaded and strictly proven.

The court has perused the receipts that have been produced in this case and they relate to the following:

