



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 482 OF 2009

DAVID IRUNGU (Suing as the Legal Representative and Administrator of the estate of the late Phillise Muthoni Gikangu).....**PLAINTIFF**

VERSUS

1. MANESH C. PURAREL

2. PRIME C. & C.R.

3. STEPHEN PUTZKER

4. SIGNON FREIGHT LIMITED.....DEFENDANT

J U D G M E N T

Introduction

1. On or about the 01/01/2007, it is pleaded, the deceased was lawfully aboard motor vehicle Registration No. KAA 545 X, driven by the plaintiff along Beach Road, in Ukunda, when the said motor vehicle was controlled and or driven in a manner that it was caused to collide with a motor vehicle Registration No. KAM 236M, said to have been registered and owned by the 4th defendant but under the control and possession of the 3rd defendant. As a consequence of which collusion the deceased suffered fatal injuries for which the defendants are blamed on account of negligence.

2. The plaintiff blames the driver of motor vehicle Reg. KAM 2326M in negligence for among other reasons; driving at excessive speed in the circumstances, emerging at a junction before ascertaining that it was safe to do so by failing to give way, entering a roundabout without yielding to the rule of the road, failing to maintain any proper or due control of the motor vehicle and disregard the safety and wellbeing of the other road users.

3. As at the time of her death, the deceased was said to be aged, 31 years old, was in good and vibrant state of health with normal expectation of life which was considerably shortened with the consequence that her estate and dependants suffered loss and damage at the present and in the future. The income of the deceased was pleaded to have been a net sum of Kshs.90,000/= from running a shop and a document said to be financial statement exhibited.

4. Particulars of dependants as well as those for special damages were given and the doctrine of *res ipsa loquitur* invited to aid the plaintiff case against the dependants. On account of such pleadings the plaintiff prayed on behalf of himself, the estate and the minor son for both special and general damages under the Fatal Accidents Act as well as Law Reform Act.

5. As the matter progressed, the suit against the 1st and 2nd defendants was withdrawn hence the suit only proceeded against the 3rd & 4th defendants whose statements of defence were filed on the 23/4/2013 and 8.9.2011 respectively.

6. For the 3rd defendant, there was filed a defence which admitted the description of the parties at paragraphs 1, 4 & 5 but denied any knowledge of what is pleaded by the plaintiff at paragraphs 2, 3 & 7 of the plaint which were description of the 1st and 2nd defendant as well as their beneficial ownership of the motor vehicle KAM 236M. The 3rd defendant admitted the occurrence of the accident at the time and place pleaded but contended that accident was caused by the negligence of the plaintiff in his careless and negligent manner of controlling motor vehicle Registration No. KAA 545X.

7. The particulars of negligence were then attributed to the plaintiff and pleaded to include; driving the said motor vehicle on the path and way of the motor vehicle KAM 236M at an excessive speed and while under the influence of alcohol which rendered him incapable of keeping a proper lookout so as to ensure the safety of other road users and that of his passenger.

8. For the 4th defendant, the position taken was to deny all allegations in the plaint and place lots of premium on the fact that it was not the owner or the person in possession and control of the motor vehicle on the date of the accident it having sold the same way back in 2003.

9. The plaintiff also filed a list of witnesses, a list of documents and copies of such documents together with a supplementary list of documents containing the police abstract dated 23/5/2003. At trial only the plaintiff and the 4th defendant gave evidence and produced the documents they had filed before closing respective cases. For the 3rd defendant no evidence was led at all after counsel opted to close the case without a witness testifying.

Evidence by the plaintiff

9. In his evidence the plaintiff adopted his witness statement dated 17/7/2013 then produced the documents filed as exhibits **P1** up to **P11**. The evidence in the witness statement was to the effect that on the material day, he was driving the motor vehicle KAA 545X along Beach Road with the deceased as his passenger when the collision occurred. According to the plaintiff the collision occurred when the motor vehicle Registration No. KAM 236M with full-lights on, veered off its lane and collided with the vehicle he was driving. He then gave the details of the special damages incurred. He said he lost consciousness and regained at the hospital and that the driver of KAM 236M was charged in court, was fine and barred from driving for a period and that is how he came to know him. He said the deceased would earn a monthly income of **Kshs 90,000** by operating an electric spare shop.

11. When cross-examined by Ms. Kibe, for the 3rd defendant, the witness said that he and the deceased were driving home from a party at Neptune Hotel where he had been taking sodas and that he was driving on his lane on the left side of the road when the accident occurred. He confirmed having filed a Succession Cause and obtained a grant *ad colligenda bona* which was issued on 28/12/2009 and the suit filed on 28/12/2019.

12. On the income of the deceased, he reiterated that she operated a business but confirmed not to have had any document to prove same, not even a trade license save for a financial statement for the year ended 31/12/2006. When asked questions by Ms. Ndeto for the 4th defendant, the witness said that he blamed the 3rd defendant for the accident and that he sued the 4th defendant because the motor vehicle was shown to have been registered in its name as at 01/01/2007 as shown by the Certificate of search and that it is possible to sell a motor vehicle and fail to effect a transfer immediately.

Evidence by the 4th defendant

13. One Isaac Cheron, an employee of the 4th defendant, gave evidence based on his witness statement dated 3/8/2016. In that statement it was asserted that the motor vehicle KAM 236M was bought by the 4th defendant in the year 2000 and used by it till the 3/7/2003 when the same was sold to one Nelson Korir at a price of **Kshs.628,500.00**. He then produced the documents to evidence the transactions and insisted that the 4th defendant was never the registered owner of the motor vehicle on the date of the accident.

14. On cross examination by the plaintiffs advocate, the witness agreed that according to the official searches, availed as exhibits, the motor vehicle was registered in the name of the 4th defendant as at the date of the accident.

Issues and analysis of facts and determination

15. From the pleadings and evidence the occurrence of the collision between the two motor vehicles and the death of the deceased are not in dispute. The dispute seems to be whose fault occasioned the accident and the death; who was the owner in control of the motor vehicle KAM 236M on the material day and whether or not the plaintiff is entitled to the remedies and relies sought or any of them. I propose to base my determination by answering the following four issues:-

i. Whose fault resulted in the accident of 01/01/2007 in which the deceased died?

ii. Who was the owner and the person in possession and control of motor vehicle KAM 236M at the time of the accident?

iii. Is the plaintiff entitled to any damages?

iv. What is the quantum thereof?

v. What orders should be made as to costs

Causation of the accident

16. In determining this question it must be recalled that the accident occurred in the night and involved two drivers, the plaintiffs and 3rd defendant. At trial only the plaintiff gave evidence while the 3rd defendant opted not to offer any evidence to support its pleading attributing whole or substantial contribution to the plaintiff. Without evidence in rebuttal by the 3rd defendant, the only available evidence on causation is that by the plaintiff which demonstrates that the 3rd defendant, being the driver of KAM 236M, veered off its lane and knocked the

plaintiffs motor vehicle which was then on its rightful lane. In addition out of the accident the 3rd defendant was charged in Kwale Magistrate Court, in **Traffic Case no 9 Of 2007**, with the offence of causing death by dangerous driving and fined Kshs.30,000/=. It is of note that in cross-examination of the plaintiff no questions were posed to challenge that assertion by the plaintiff.

18. I therefore find and hold that on the evidence on record, it has been proved on a balance of probabilities that the accident was occasioned by the 3rd defendant's failure to exercise due and proper control over the motor vehicle KAM 236M thus occasioning the accident and consequent death of the deceased. For that reason, I hold the 3rd defendant to have been wholly negligent and liable to the plaintiff at 100%.

In whose possession, control and power was the motor vehicle KAM 236M at the material time?

19. While the documents of searches all pointed to the fact that the motor vehicle was on the material day registered in the name of 4th defendant, that is merely a rebuttable presumption. It is capable of being displaced by evidence otherwise demonstrating that the control and possession was elsewhere[1]. The evidence of D1, which was never contested or challenged, was that the motor vehicle was sold by the 4th defendant way back in 2003, some 4 years before the accident. That evidence in my finding wholly displaced the prima facie evidence of ownership, control and possession of the motor vehicle from the 4th defendant effective the date the disposal was made[2].

20. To the contrary there was ample and uncontested evidence that the 3rd defendant was the driver of the motor-vehicle on the material date at time. He was in fact charged with causing the deceased's death by dangerous driving and, in the evidence of PW 1, convicted.

21. Even though conviction alone is not an estoppel upon the convict to allege and prove contributory negligence and even though the 3rd defendant did plead such negligence against the plaintiff, no evidence was led by the said defendant with the consequence that the said allegations remain disproved and cannot be the basis to lessen the defendant's liability.

22. Accordingly, I do reiterate the finding that the 3rd defendant having been the driver of the motor vehicle KAM 236M at the time and date of the accident, and the person who was charged and convicted for the cause of the deceased's death, he is wholly to blame and thus liable to the plaintiff.

Is the plaintiff entitled to the reliefs sought?

23. This suit is founded on the tort of negligence. In law a person who is adjudged to have caused injury to another is bound to pay damages toward compensation for the loss thereby occasioned. This suit being brought by the plaintiff for himself and on behalf and for the benefit of the deceased estate and the other only dependant to the deceased, pursuant to both Law Reform Act and Fatal Accidents Act, there are established heads of damages a court expected to consider awarding. Being so guided by *stare decisis*, I now award to the plaintiff damages under the following heads:

Law Reform Act

24. The awards under this statute are due to the estate and comprise pains and suffering and loss of expectation of life. The evidence by the plaintiff which remain unrebutted was that after the accident, he lost consciousness and found himself in hospital and that while at the hospital he was informed that the deceased had been taken to another hospital and had in fact died. More should have been done to assist court determine how long the deceased survived after the accident and therefore the duration the pain was endured. However there is also no evidence that the deceased died on the spot. I thus conclude that the deceased died while undergoing treatment at the hospital.

25. I also find that between the time of collision, rescue operations up to the time she died in hospital, the deceased must have suffered some pain for which the estate is entitled to damages. I assess such damages for pains and suffering in the sum of **Kshs.60,000/-**.

26. For loss of expectation of life, I am guided that the deceased was aged 30 years and no evidence was led that she suffered any decease that would have otherwise cut her life short, had the accident not occurred. I award to the plaintiff the sum of Kshs.150,000/= for loss of expectation of life. In making these awards I have taken regard of the parties' submissions and the decided cases cited.

Damages under fatal Accidents Act

27. Damages under this statute are calculated on the basis of known or ascertainable income of the deceased which is lost by virtue of wrongful death and is usually measured on the reasonably expected period the income would have flowed to the deceased save for the premature death. Such damages may be called loss of dependency where there is established dependency, as a matter of evidence. It also takes the form of lost years where there is no dependent surviving the deceased.

28. In this matter, the deceased was pleaded and proved to have been survived by a husband and a son aged some 8 years. I do consider those to be the dependants who have been deprived dependency by the death I have held to have been unlawfully and wrongfully caused by the 3rd defendant. The usual route is to adopt the multiplier formula which employs the known or established annual income when subjected to proven dependency ratio over a period the court determines to represent the period lost.

29. However the multiplier formula is not the only formula[3] and is inappropriate where the income may be unascertainable from the evidence and other parameters like dependency are also uncertain. In such cases, like in this matter, where no evidence was led on dependency and the financial statements are to this court not convincing income of the deceased owing to the fact that no evidence was led that such business ever existed, it is permissible for the court to award a global sum[4].

30. Taking all circumstances into consideration including the age of the deceased, I do award to the plaintiff the sum of Kshs.1,000,000/= on account of lost years.

31. Before I conclude, there were submissions made by the 3rd defendant on the competence of the suit. The attack was two pronged; i) suit statute barred, and ii) the plaintiff lacks *locus standi* to bring the action on the basis of the fact that the letters of grant *ad colligenda bona* issued did not permit him to bring the suit.

32. To those issues, this court takes the position that the same were never pleaded by the 3rd defendant so as to allow the plaintiff a chance to comment on them. In fact even at trial the 3rd defendant did not advert to either of the issues on their cross examination. To make the same the basis of this determination would be to affront the right to a fair hearing under Article 50(2) which to this court is the foundation of the now established principle of law that parties are bound by their pleading just like the court is equally bound to determine a dispute before it purely on the basis of the pleadings or matters put for determination by the materials placed on record by the parties. This is what the Kenyan superior courts have said consistently and was echoed recently in the decision of the Court of Appeal in **Sarah Jelangat Siele Vs Attorney General & 3 Others (2018)eKLR** quoted in **Ushago Diani Investments Ltd Vs Jadeen Mana Abdulwahab (2018)eKLR** where the court said:-

“It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination. See this Court’s decision in Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. (2000)2 EA 385. However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court’s decision when a party addresses the court and leads evidence on the issue. See Vyas Industries v Diocese of Meru [1976] eKLR.”

Rendition

33. In conclusion I determine the suit as follow:-

a) Judgment is entered for the plaintiff against the 3rd defendant on liability at 100%.

b) The damages are assessed and awarded as follows:-

i) Special damages	Kshs.	55,700
ii) Pains and suffering	Kshs.	60,000
iii) Loss of expectation of life	Kshs.	150,000
iv) Lost years	Kshs.	1,000,000

Total **Kshs. 1,265,700**

c) On the sums awarded, the plaintiff gets interests at court rates from the date of the suit, on special damages, and from the date of this judgment, on general damages.

d) The costs of the suit is awarded to the plaintiff

e) The suit against the 4th defendant is dismissed but with no orders as to costs because there was a plausible reason why the plaintiff sued the said defendant.

Dated, signed and delivered at Mombasa this 26th day of July 2019

P.J.O. OTIENO

JUDGE