



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1020 OF 2006**

**NELLY NDUKU MUTUA (Suing as**

**the legal representative of the estate of**

**JAMES MUTUA MAKENZI-Deceased).....PLAINTIFF**

**-VERSUS-**

**AFRICA LINE TRANSPORT CO. LIMITED.....DEFENDANT**

**SIMON KABETHI BACHIA.....THIRD PARTY**

**JUDGEMENT**

1. The plaintiff herein, being the legal representative of the estate of James Mutua Makenzi (*“the deceased”*) instituted the suit against the defendant on behalf of the deceased’s estate by way of the plaint dated 13<sup>th</sup> September, 2006. The same was brought under the Law Reform Act, Cap. 26 and the Fatal Accidents Act, Cap. 32.

2. On its part, the defendant was sued in its capacity as the registered owner of the motor vehicle registration KAH 150N M.A.N Prime Mover (*“the subject motor vehicle”*) at all material times.

3. The plaintiff pleaded in her plaint that sometime on or about the 16<sup>th</sup> of December, 2004 while the deceased was lawfully travelling aboard the motor vehicle registration number GK Z 891 Nissan Urvan along Kenol-Sagana Road, the defendant’s authorized driver while negligently driving and/or controlling the subject motor vehicle, caused the same to lose control and hit the motor vehicle registration number GK Z 891 resulting in fatal injuries to the deceased. The particulars of negligence were set out under paragraph 5 of the plaint.

4. It was also pleaded that at the time of his death, the deceased was a healthy 48-year old man working in the civil service as a Deputy Director of Budget, Job Group “R” and earning a monthly salary of Kshs.100,025/.

5. It was similarly pleaded in the plaint that the deceased left behind the following dependants:

- i. Nelly Nduku Mutua   Widow
- ii. MM Daughter       Born in 1989
- iii. EM Son               Born in 1991
- iv. DM Son               Born in 1993

6. Consequently, the plaintiff sought for the reliefs hereunder:

- a) *General damages under the Law Reform Act and the Fatal Accidents Act.*
- b) *Special damages of Kshs.5,884/.*
- c) *Interest on a) and b) above.*
- d) *Any further or other relief that this Honourable Court may deem fit to grant.*

7. Upon service of summons, the defendant entered appearance and filed its statement of defence on 13<sup>th</sup> November, 2006 essentially denying that it was at all material times the registered owner of the subject motor vehicle or that the accident occurred in the manner pleaded in the plaint.
8. The defendant pleaded that the accident was caused solely or substantially by the negligence on the part of the driver of the motor vehicle registration number GK Z 891, the particulars of which were set out under paragraph 7 of the defence.
9. The defendant further pleaded that in the alternative, the said accident was the result of sole or substantial negligence of the driver of the motor vehicle registration number KAM 287R and indicated that it would later be seeking leave of the court to enjoin the owner of the said vehicle vide third party proceedings. The particulars of negligence in this regard were similarly set out.
10. It was also denied in the statement of defence that the deceased sustained fatal injuries and that the plaintiff was entitled to the reliefs sought in her plaint.
11. The plaintiff rejoined with the reply to defence filed on 22<sup>nd</sup> November, 2006 by and large reiterating the contents captured in the plaint.
12. Subsequently, the defendant took out third party proceedings against one *Simon Kabethi Bachia* on the premise that his motor vehicle registration number KAM 287R solely or substantially contributed to the accident. In this respect, a third party notice dated 12<sup>th</sup> October, 2007 was issued against the aforesaid Simon Kabethi Bachia.
13. Further to the above, the Honourable Mr. Justice D.A. Onyancha vide his ruling delivered on 18<sup>th</sup> August, 2019 allowed the defendant's application dated 26<sup>th</sup> September, 2007 which application sought to have the present suit tried as a test suit and the related suits stayed pending its hearing and determination.
14. Thereafter, the third party entered appearance and filed his statement of defence dated 23<sup>rd</sup> October, 2007 pleading that while it is true that the accident occurred as outlined in the plaint, he was not to blame for the same, alleging instead that the accident was caused wholly by the driver of the defendant. The third party went ahead to set out the particulars of negligence in that regard.
15. Further to the above, it was pleaded by the third party that the defendant is in no way entitled to any indemnity and/or contribution against him. Consequently, the third party urged this court to dismiss the defendant's claim against him with costs.
16. When the matter proceeded for hearing, the plaintiff's case was supported by the evidence of two (2) witnesses while the defendant and third party called one (1) and three (3) witnesses respectively.
17. The plaintiff who was *PW1* began by adopting her witness statement signed on 22<sup>nd</sup> March, 2012 indicating inter alia, that she was the widow of the deceased. In her evidence, the plaintiff stated that she was at all material times employed at NSSF as a secretary. She went ahead to state that she blames the driver of the subject motor vehicle for the accident that resulted in the demise of her husband. The plaintiff further produced the documents constituting her list and bundle of documents dated 22<sup>nd</sup> March, 2012 as *P. Exhibits 1-14*.
18. During cross examination, the plaintiff testified that as per her knowledge, the matter was pending under investigations, adding that she was not aware that the driver of the subject motor vehicle had been charged in relation to the accident and was eventually acquitted.
19. Muthengi Muthami (*PW2*) testified that he at all material times worked with the Judiciary as a driver and mechanic. He equally adopted his witness statement as signed and filed. The witness blamed the driver of the subject motor vehicle.
20. On cross examination, *PW2* indicated that on the material day, he was driving the motor vehicle registration number GK Z 891 to Nairobi from Kerugoya and that the subject motor vehicle was coming from the opposite direction. He stated that he saw a saloon car coming from the same route as the subject motor vehicle when the said vehicle rammed into other vehicles which were ahead of it. It was the witness' testimony that the subject motor vehicle was being driven at a high speed and that it had lost control prior to the accident.
21. The witness went ahead to state that he was a witness in Traffic Case No. 1143 of 2009 wherein the driver of the subject motor vehicle was charged in relation to the accident, though he admitted that he was not aware of the outcome thereof. *PW2* stated that it is not true that the motor vehicle registration number KAM 287R being driven by the third party on the material day came in between the subject motor vehicle before the accident occurred. The witness added that the vehicle he was driving was hit by the subject motor vehicle and that he witnessed other vehicles being knocked by the said motor vehicle.
22. On being cross examined, *PW2* reiterated that he saw the subject motor vehicle approaching from the opposite direction at a high speed while indicating warning lights, adding that the subject motor vehicle was the only one that rammed into the vehicle he was driving, causing him to lose consciousness. This marked the close of the plaintiff's case.
23. On his part, Anthony Mbiu in his evidence as *DW1* stated that he was summoned for the purpose of producing as *D. Exhibit 1* the typed proceedings and ruling in *Kiambu Traffic Case No. 1143 of 2009 (R v Hassan Jillo Nyae)*. The witness went further to explain that the accused person in that case was charged with two (2) counts of causing death by dangerous driving and two (2) charges of careless driving, adding that the court in that case found that there was no credible evidence of careless and/or dangerous driving of the subject motor vehicle by the accused person, thereby acquitting him under Section 210 of the Criminal Procedure Code (CPC). The witness was not cross examined and consequently, the defendant closed its case.
24. The third party testified as *DW2*, first adopting his witness statement. The witness admitted to having testified in the aforementioned

Traffic case though indicating that he had no knowledge of the acquittal of the accused person in that instance. DW2 equally admitted to being the driver of the saloon car registration number KAM 287R on the material day but denied having overtaken the subject motor vehicle prior to the accident.

25. During cross examination, the witness clarified *inter alia*, that the subject motor vehicle was behind him and that following the accident, his vehicle was thrown to the right side of the road. He further testified that prior to the accident, the subject motor vehicle was moving in a zig-zag manner and that the dent on the front side of his vehicle resulted from the impact of the accident.

26. On re-examination, it was DW2's evidence that the pick-up truck was the first vehicle to be hit followed by his vehicle and then the GK vehicle.

27. Ruth Murugi vide her evidence as DW3 essentially adopted her signed and filed witness statement. During cross examination, she stated that following the accident, the motor vehicle registration number KAJ 590K which she was in fell on the right side of the road, though she could not tell what happened next since she was taken to hospital soon thereafter.

28. On being re-examined, the witness clarified that the vehicle she was in was knocked by the subject motor vehicle.

29. David Nyaga Mukindia who was DW4 similarly adopted his witness statement and stated that the driver of the subject motor vehicle was wholly to blame for the accident and it came as a surprise to him that he was acquitted. The witness added that his motor vehicle registration number KAJ 590K was equally damaged as a result of the accident.

30. On cross examination, the witness stated that he had not seen the motor vehicle registration number KAM 287R driven by the third party until after the accident and this was reiterated during re-examination, with the witness testifying that the said motor vehicle was ahead of his prior to the accident and that the driver of the subject motor vehicle was solely to blame for the accident. This marked the close of the third party's case.

31. At the close of the hearing, the parties filed and exchanged written submissions. I have considered the same and observed that the issues for determination are two (2)-fold namely: liability and quantum.

32. On *liability*, the plaintiff submits that in view of the evidence adduced before this court, it is clear that the defendant's driver did not maintain a safe distance between himself and other road users, thereby causing the accident. Moreover, the plaintiff contends that despite the fact that the said driver was acquitted in the traffic court, the courts have reasoned that findings in criminal cases are in no way binding on a civil court. The cases of *Power Lighting Comp. Ltd & Another v Zakayo Saitoti Naingola & Another [2008] eKLR* and *W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR* were cited in this respect.

33. It is the plaintiff's submission that the defendant ought to be found 100% liable.

34. On its part, the defendant contends that owing to the fact that the court in the traffic case determined that there was no evidence to show that the subject motor vehicle was being driven carelessly and/or negligently or at a high speed and that instead, it was the third party who caused the accident, this court is now urged to rely on the above reasoning and find that the defendant is not to blame for the accident.

35. The third party argued that the evidence tendered both by PW2 and the witnesses for third party supports the fact that the defendant through its driver is to blame for the accident. The third party went on to argue that it is clear from the various testimonies that the subject motor vehicle belonging to the defendant hit all the relevant motor vehicles, adding that the defendant wrongly enjoined him in the proceedings since it has failed to prove liability on his part and that in any event, the plaintiff has not argued that the third party was in any way liable for the accident.

36. It is the third party's submission that the defendant has alleged but failed to prove liability on his part as required by law.

37. I have taken into account the respective positions stated herein above and now render the following view. On the issue of ownership, I noted the defendant's denial of owning the subject motor vehicle. However, I have looked at the copy of records produced by the plaintiff and find that the said vehicle was registered in the defendant's name as at 3<sup>rd</sup> March, 2006; this is prima facie evidence of ownership. The plaintiff also produced the police abstract which I have equally evaluated and find that the defendant is indicated as being the registered owner of the subject motor vehicle. It is noteworthy that the defendant has in no way challenged the police abstract, which in the absence of contrary evidence, is deemed to be conclusive proof of ownership. Such was the reasoning given in *Samuel Mukunya Kamunge v John Mwangi Kamuru [2005] eKLR* thus:

**“...I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A... and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent.”**

38. From the foregoing, I am satisfied that the plaintiff has proved on a balance of probabilities that the defendant is the registered owner of the subject motor vehicle.

39. In addressing whether the plaintiff has established liability on the part of the defendant, I have perused the Traffic Court file produced as *D. Exhibit 1* before this court and ascertained that the driver of the subject motor vehicle on the material day was charged in relation to the accident and acquitted under Section 210 of the CPC.

40. I have taken the above finding into account and take the following view. While it is well appreciated that the standard of proof in criminal

cases is higher than that in civil cases, this is not to say that an acquittal on criminal charges implies the absence of liability. Moreover, the finding of a criminal court does not and cannot bind a civil court. This was pointed out in the plaintiff's submissions and authorities cited in support of such position.

41. It therefore follows that the defendant cannot be deemed free from liability on the sole basis of the finding in the traffic case. The case now before this court would need to be considered on its own facts.

42. Going by the testimony of various witnesses for the plaintiff's and third party's cases respectively, it is clear that there is consistency in the position that the defendant's driver wholly caused the accident. It was explained that the said driver was moving in a zig-zag manner. It was further explained that the subject motor vehicle hit each of the vehicles affected in the accident.

43. I have equally noted the witness' accounts that the subject motor vehicle was speeding prior to the accident. While no evidence was adduced to confirm the exact or approximate speed at which the subject motor vehicle was travelling at, I noted from the traffic case file that an examination of the subject motor vehicle was undertaken and a certificate of examination and test prepared. The same is indicative that damage had been occasioned to the vehicle. Of interest to this court is the remarks made at the end of the report, stating that the subject motor vehicle had no pre-accident defects. This is to say that prior to the accident, the vehicle was in proper condition.

44. From the foregoing, it is reasonable to state that the examination of the subject motor vehicle coupled with the evidence adduced by the witnesses before this court lead me to conclude that; on a balance of probabilities; it is more likely than not that the subject motor vehicle was being driven negligently.

45. Turning to the question of whether the third party contributed to the accident, I make reference to the ruling by the trial magistrate in the traffic case where she reasoned that the motor vehicle registration number KAM 287R being driven by the third party was essentially to blame for the said accident by virtue of the fact that the third party by way of his testimony stated that he was in the process of overtaking the subject motor vehicle when the accident took place.

46. I have considered the testimonies of the various witnesses in the traffic case and noted a consistency in the accounts given to the effect that the subject motor vehicle first knocked pick-up registration number KAJ 590K. Neither of the witnesses testified to the effect that the third party's vehicle overtook the subject motor vehicle prior to the accident save for PW 14; who upon visiting the scene after the fact and carrying out investigations on the same; testified as to the overtaking of the subject motor vehicle by the vehicle being driven by the third party. This position was not corroborated by either of the other witness' accounts.

47. I have evaluated the witness' accounts presented before this court and ascertained that the third party's vehicle was at all material times ahead of the subject motor vehicle and there is no mention that the third party overtook the said motor vehicle before the occurrence of the accident. If anything, both the plaintiff's and third party's witnesses seem to tell a similar story that the defendant's subject motor vehicle wholly caused the accident, and which evidence has not been challenged by the defendant in any other manner save with reference to the determination of the traffic case.

48. It is my observation that the defendant has not established the nexus between the third party and the occurrence of the accident. There is thus no basis on which I can come to the conclusion that the third party was either substantially or wholly to blame.

49. Consequently, I am satisfied that the plaintiff has proved negligence on the part of the defendant to the required standard of a balance of probabilities. I find the defendant wholly liable for the accident.

50. On quantum it was earlier indicated that this suit is brought under the Law Reform Act and the Fatal Accidents Act, both of which cater for general damages. I will first address general damages for pain and suffering, and loss of expectation of life under the Law Reform Act; followed by general damages for loss of dependency under the Fatal Accidents Act.

*a) Pain and suffering*

51. Under this head, the plaintiff proposed the sum of Kshs.200,000/ citing the case of *Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR* where a similar award was made. On its part, the defendant urged this court to award the sum of Kshs.10,000/ with reliance on the case of *Harjeet Singh Pandal v Hellen Aketch Okudho [2018] eKLR*. The third party similarly proposed the sum of Kshs.10,000/.

52. I have considered the respective positions taken hereinabove going by the evidence on record, there is no clear indication as to whether the deceased died on impact or soon thereafter; nevertheless, it was not mentioned that he was taken to hospital for medical attention. In that case, I find the sum of *Kshs.10,000/* to be reasonable.

*b) Loss of expectation of life*

53. The plaintiff submitted that the sum of Kshs,200,000/ would suffice under this head, whereas the defendant and third party urged this court to award Kshs.50,000/ and Kshs.100,000/ respectively.

54. I deem it necessary to mention that an award under this head varies depending on the unique circumstances of each case such as the age of the deceased at the time of his or her death. On my part, I will award a conventional figure of *Kshs.100,000/* as has been awarded by the courts on previous occasions.

*c) Loss of dependency*



<i>Loss of expectation of life</i>	<i>Kshs. 100,000/</i>
<i>Loss of dependency</i>	<i>Kshs.3,367,779.50/</i>
<i>ii. Special damages</i>	<i><u>Kshs. 2,275/</u></i>
<b>TOTAL</b>	<b><u>Kshs.3,480,054.50/</u></b>

*iii. Costs of the suit are awarded to the plaintiff. The plaintiff shall also have interest at court rates on special damages from the date of filing of the suit and interest at court rates on general damages from the date of judgment until payment in full.*

*b) The Third Party proceedings filed by the defendant against the Third Party are dismissed with costs being awarded to the Third Party as against the defendant.*

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of September, 2019.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... **for the Plaintiff**

.....**for the Defendant**