



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 527 OF 2012

SAFIA MUHAMUD ALI1ST PLAINTIFF

JOHN MUTUKU NZIOKA (Suing as administrators of

the Estate of GABRIEL MWANZA MULI Deceased.....2ND PLAINTIFF

VERSUS

NGENO WELDON.....1ST DEFENDANT

PURITY M. KAWIRA2ND DEFENDANT

JUDGEMENT

1) Sofia Muhamud Ali and John Mutuku Nzioka the 1st and 2nd plaintiffs respectively in their capacities as the administratrix and administrator respectively of the estate of Gabriel Mwanza Mule, deceased filed a compensatory suit against Ng'eno Weldon and Purity Kawira, the 1st and 2nd defendants respectively, for the fatal injuries the deceased suffered in a road traffic accident involving motor cycle registration no. K.M.C.P. 849A and motor vehicle registration no. KBL 330H.

2) The aforesaid accident occurred on or about 4th February 2012 along Nairobi-Mombasa Highway near Kapa area. The defendants filed a joint statement of defence to deny the plaintiffs' claim.

3) When this suit came up for hearing, the 1st plaintiff and two other witnesses testified in support of the plaintiffs' case. P. C. Hussein Mohamed (PW1), a police officer from Embakasi police station testified and blamed the driver of motor vehicle registration no KBL 330H for knocking down motor cycle registration KMCP 849A from the rear. He said that the driver of the motor vehicle failed to keep a safe distance from the motor cycle.

4) Shadrack Muindi Mutua (PW2) an independent eye witness testified too and blamed the driver of the aforesaid motor vehicle for driving at a very high speed behind the motor cycle on a road which was still under construction. PW2 said he witnessed the motor vehicle crush onto the rear of the motor cycle because the driver failed to keep a reasonable braking space while driving at a high speed. PW2 said he saw the motor vehicle hit the motor cycle throwing the pillion passenger onto the air before landing his head on the edge of the pavement of the road to the left side which is indicative of high speed on the part of the motor vehicle.

5) PW2 further stated that the impact of the crash ripped off the front bumper of the vehicle together with the number plate of the motor vehicle. PW2 also said that the driver of the motor vehicle drove at a high speed without stopping after the accident leaving behind the bumper and the number plate of the vehicle.

6) Saif Muhamud Ali (PW3) told this court that the deceased was her husband who died as a result of a road traffic accident at the age of 42 years. PW3 further stated that the deceased was a manager. PW3 produced a payslip showing that the deceased worked with Metropolitan Kenya earning a gross monthly sum of ksh.154,473/27 as of 25.11.2011.

7) Ng'eno Weldon (DW1) testified in support of the defence case.

He stated that he was the driver of motor vehicle registration no. KBL 330H at the time of the accident. DW1 said that he was driving on his side of the road when suddenly motor cycle registration no. K.M.C.P 849A emerged and joined his lane without any prior or proper indication forcing him to swerve to the left as there was another vehicle to his right.

8) DW1 further stated that upon the motor cyclist realizing his mistake, equally swerved to the left causing him to ram into the motor cycle from the rear. DW1 claimed that PW2 was not at the scene of the accident. DW1 also stated that he was not charged with any traffic offence

and that the motorcyclist was wholly to blame.

9) After considering the evidence and the rival submissions, two issues commend themselves for determination:

i. Who is to blame for the accident?

ii. Whether damages should be awarded and how much?

10) On liability, the plaintiff presented evidence of the traffic police officer (PW1) who told this court that the accident occurred along Nairobi-Mombasa on the off-side known as service lane and not on the main road. PW2 averred that the driver (DW1) of the motor vehicle fled from the scene of the accident. DW1 did not contest this assertion hence he cannot therefore have been in a position to know whether PW2 an eye witness, was at the scene of the accident.

11) I am convinced that PW2 told the truth. His evidence was consistent and was not shaken during cross-examination. DW1 admitted that he hit from the rear of the motor cycle where the passenger was a pillion passenger which admission is consistent with the evidence given by PW1 and PW2. The defendant did not bring third party proceedings against the owner or rider of motorcycle registration no. KMCP 849A therefore this court cannot apportion liability. I am satisfied that the plaintiffs have tendered evidence showing that the defendant is wholly to blame for the accident. The defendant failed to keep a safe distance between his motor vehicle and the motorcycle.

12) On quantum the plaintiff urged this court to make the following awards:

a. Special damages ksh.550/=

PW1 produced a receipt as proof. The defendant pointed out that the plaintiffs only pleaded ksh.500/= therefore they are entitled to what was pleaded and proved. With respect I agree with the defendants. Consequently I award the plaintiffs ksh.500/=.

13) The plaintiffs sought to be paid ksh.100,000/= to cover funeral expenses. PW3 stated that she misplaced the receipts for funeral expenses. They therefore urged this court to note that funerals are expensive hence they should be awarded a reasonable sum as proposed. The plaintiffs cited the case of **Gaudencia Atieno Otieno vs Akamba Public Road Services H.C.C.C no. 173 of 2001** where this court awarded a sum of ksh.33,000/= as a reasonable figure for funeral expenses despite the fact that no receipts were submitted. The defendants did not address this court over the issue in their submissions.

14) Though the plaintiffs did not supply any documentary evidence to prove the amount expended on the deceased's funeral this court is alive of the fact that there is no dispute that there was a funeral conducted for the deceased,

15) In such an activity the family and relatives of the deceased incur expenses like purchasing of a coffin, transporting the same, feeding the grieving and paying for morgue charges. In the circumstance of this case I think a sum of ksh.60,000/= is reasonable as opposed to that of ksh.100,000/= which appears to be exorbitant.

16) The plaintiffs have also sought to be awarded a sum of ksh.150,000/= for pain and suffering. The plaintiffs stated that the deceased died while undergoing treatment at Kenyatta National Hospital. The plaintiffs cited the case of **Jenipher O. Oloo & Another vs Elizabeth Mbuka & Another Mombasa H.C.C.C no. 324 of 2002** where this court awarded a sum of ksh.30,000/= stating that the deceased underwent a lot of pain before he passed on.

17) The defendants are of the submission that a sum of kshs.10,000/= is sufficient. They cited the case of **John Mureithi Kariuki vs George Mwangi (2012) eKLR** where this court awarded a sum of ksh.10,000/= on the basis that the deceased suffered great pain while undergoing treatment.

18) It is not in dispute that the deceased was admitted at Kenyatta National Hospital on 4th February 2012 where he passed away on the same date. It is clear from the death certificate that the deceased died as a result of multiple injuries due to blunt trauma. The evidence tendered show that the deceased was thrown onto the air before falling on the edge of the road. He must have suffered great pain before succumbing to the injuries. I think an award of ksh.40,000/= is reasonable in the circumstances. The deceased did not stay in hospital for a long time so that it can be said he suffered great pain for long.

19) The plaintiffs have also asked this court to award them a sum of ksh.200,000/= for loss of expectation of life. The plaintiffs pointed out that the deceased who was aged 42 years had a robust health and therefore had good prospects of a full life expectancy.

20) The plaintiffs relied on the case of **Jane Kwamboka vs Ouro Nyamoki & Ano. Kericho H.C.C.C no. 33 of 2001** where this court awarded a sum of ksh.100,000/= for a deceased who was aged 43 years at the time of death. The defendants on the other hand have urged this court to award a conventional figure of ksh.70,000/= on this head.

21) The defendants cited two cases where the aforesaid amount was awarded vizly:

Caroline Anne Njoki Mwangi vs Paul Ndungu Muroki (2004) eKLR in which the deceased was aged 34 years and **John Mureithi Kariuki vs George Mwangi (2012) eKLR** where the deceased was aged 26 years.

22) After considering the authorities supplied by both sides, I am convinced that the relevant and appropriate authority is the case cited by the plaintiffs i.e. **Jane Kwamboka vs Ouro Nyamoki & Another (supra)** taking into account the inflationary trends, I think an award of

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent