



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 153 OF 2002

LYDIA NDUKU KAVYU (Suing as administrator of the estate of the Late

PAUL NDULYA KAVYU -DECEASED).....PLAINTIFF

-VERSUS-

THE ATTORNEY GENERAL.....-DEFENDANT

JUDGEMENT

1. According to the amended pleadings filed on 14.4.2003, the deceased was 57 years old when he died as a result of a road accident along Kangonde- Kabati- Kitui Road where he was a passenger in Motor Vehicle GK Z737. An action was brought in this court through his wife as a legal representative against the Defendant under the Fatal Accidents Act. The plaintiff sought general and special damages due to negligence.

2. It was pleaded that on 22.1.2000, the deceased was a civil servant working as a commissioner in the permanent presidential music commission and lecturer at Kenyatta University. It was pleaded that he was a lawful passenger in the suit vehicle and along Kangonde-Kabati-Kitui Road when the defendant's driver negligently drove the suit vehicle that it lost control and rolled causing the deceased fatal injuries. The plaintiff pleaded negligence as particularized in paragraph 4 of the plaint but did not specifically plead special damages. It was pleaded that the dependants of the deceased lost their means of livelihood as the deceased was supporting the 4 dependants listed in paragraph 5 of the plaint. In the plaintiff's documents filed on 25.4.2018 was inter alia the abstract in respect of the accident, grant of letters of administration issued on 17.5.2004 and confirmed on 8.2.2006 and her marriage certificate together with the death certificate of the deceased. On record are pleadings in Misc Appl 238 of 2002 Nairobi where the plaintiff sought leave to file a suit out of time and a copy of the undated ruling by Hon R.E. Ougo granting requisite leave to allow the plaintiff to file the suit out of time.

3. The defendant denied negligence and its particulars, denied the accident and averred that the accident was caused by an intervening action beyond the control of the defendant. The defendant challenged the capacity of the plaintiff to bring the suit and prayed that the suit be dismissed with costs.

4. The defendant filed a preliminary objection dated 25.4.2015 challenging the instant suit for being defective as it was statute barred under Section 3 of the Public Authorities Limitations Act CAP 39.

5. The suit proceeded for hearing on **7.5.2018** where the plaintiff testified. The plaintiff was recalled and cross examined on 25.4.2019 then on the same day the defendant closed its case without calling any witnesses.

6. The plaintiff's evidence was that the deceased was her late husband who was involved in a road accident. She told the court that she had the grant as well as the ad litem. She tendered the grant that was issued on 17.5.2004 which was marked Pexh 1. She tendered the notice of intention to sue, certificate of marriage and death, birth certificate of one of the children, the police abstract and the pay-slip of the deceased. The plaintiffs case was closed but however after allowing the application dated 14.11.2018 by consent, the case was reopened. On cross examination, the plaintiff testified that she did not witness the accident and that the deceased was compensated vide a group personal accident cover through his employer. It was her testimony that she was not given the sketch plans in respect of the accident. On re-examination, she testified that she sought compensation from the defendant and that when she went to the scene, the deceased was already dead and body placed in the police vehicle.

7. Parties filed submissions. Learned counsel for the plaintiff submitted that the defendant did not call any witnesses to controvert the evidence of the plaintiff and invited the court to find the defendant 100% liable. On the issue of quantum, learned counsel submitted that the court award Kshs 200,000/- for pain and suffering under the Law Reform Act. Reliance was placed on the case of **Julian Njeri Muriithi v Veronica Njeri Karanja & Another (2015) eKLR**. Counsel posited that the plaintiff be awarded damages for lost years and that the deceased was her husband earning Kshs 34,830/- and would have retired at 75 years a multiplier of 18 years be used. For loss of expectation of life, counsel submitted that Kshs 200,000/- be awarded. In respect of damages under the Fatal Accidents Act, Counsel posited that for loss of dependency, Kshs 5,015,520 be awarded as damages. On special damages, counsel submitted that the plaintiff incurred Kshs 80,000/- as special damages and Kshs 300,000/- as funeral expenses and sought that the same be awarded.

8. In reply, learned counsel for the defendant submitted that the plaintiff had not proved liability and she did not witness the accident. Reliance was placed on the case of **Lilian Birir & Another v Ambrose Leamon (2016) eKLR**. On the issue of quantum, counsel submitted that in respect of damages under the law reform Act, general damages for pain and suffering, Kshs 10,000/- be awarded as it could be deduced that the deceased died on the spot. In respect of general damages for Loss of expectation of life, counsel submitted that Kshs 100,000/- be awarded. In respect of lost years/lost income, counsel submitted that a multiplier of 13 years be used. For damages under the Fatal Accidents Act, counsel submitted that the court adopt a multiplicand of Kshs 11,712.25/- for that was the net salary of the deceased. Counsel relied on the case of **Kiarie Shoe Stores Limited v Hellen Waruguru Waweru (2013) eKLR**. Counsel submitted that the court use a multiplier of 13 years and a dependency ratio of 1/3. On special damages, counsel submitted that the same were not quantified and reliance was placed on the case of **Hahn v Singh (1985) KLR 716**. Counsel added that the court award Kshs 60,000/- for the same was reasonable.

9. From the evidence on record the accident that happened on the material day was confirmed vide the evidence of Pw1 as corroborated by the documentary evidence that was neither challenged nor controverted. I am alive to the fact that there was no direct eye witness to the incident, there is no circumstantial evidence that linked the injuries with the accident as there is no post mortem report. The courts have found that failure to call witnesses will lead to adverse inferences being drawn. See the case of **Forces Wangithi Nderi v Samuel Kiburu Mwaura & Another[2015] eKLR**, where the court observed that:

The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2nd respondent.”

10. Having considered the pleadings and the evidence on record, the following issues are to be determined.

- a) *Whether the plaintiff had capacity to institute the instant action.*
- b) *Whether the accident was caused by the negligence of the defendant.*
- c) *Whether the defendant is liable for damage and loss the plaintiff claims to have suffered and at what percentage.*
- d) *What quantum may be awarded?*

11. The plaintiff in her testimony stated that she had an ad litem, however there is no evidence of the same. What she had was a grant that was issued well after the suit was instituted hence as at the time of instituting the suit, she had no ad litem and attempted to sneak in the complete grant and rely on the same as granting her locus standi. It serves to cite section 54 of the Law of Succession Act that provides that "a court may, according to the circumstances of each case limit a grant of representation which it has jurisdiction to make, in any of the forms described in the 5th schedule." As at the time of institution of the suit, the plaintiff had no locus standi and therefore I am commended to find that the suit be struck out for want of capacity.

12. Further in addressing the preliminary objection, the provisions of Section 29 of the Limitation of Actions Act provide that where the person injured as a result of a tortious act or omission of another dies, then his or her personal representatives can only bring an action on behalf of the estate of the deceased person within twelve months from the date when the deceased died. And therefore it follows that where such period of twelve months from date when the deceased dies has lapsed, unless, by application of Sections 22,27 and 28 of the Limitation of Actions Act, leave of court is sought and obtained extending such period for bringing an action, the action would be statute barred. In addition under Section 3 (1) of CAP 39 Public Authorities Limitations Act, it is stated that no proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

13. From the testimony of Pw1, she did not tender the application for requisite leave and the grant of the same. However she filed the same as part of her documents to be relied upon. I am inclined to believe that there was requisite leave to bring the instant application hence it is not barred by statute. Consequently I dismiss the preliminary objection dated 24.5.2015.

14. Were I to consider the suit and find that the plaintiff had capacity to institute the suit, the answer to issue (b) to (d) will depend on the amount of evidence adduced by a party having the legal burden to do so. See **sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya** that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author **WVH Rodgers, Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** as well as case law stated that the elements of negligence remains this: there is a duty of care owed by an defendant; there was a breach of the duty; there was damage caused by the breach and there was a connection between the breach and the damage. (see *Donoghue v. Stevenson* [1932] A.C. 562).

15. It is imperative to apply the above-mentioned law to the facts in the present case. It is undisputed that the defendant owed a duty of care for it is trite that a driver of a vehicle has a duty of care to the passengers. On one hand, there is the testimony of the Plaintiff through the abstract that is to the effect that the deceased was a passenger aboard the suit vehicle.

16. However the fact that the accident occurred is not proof of negligence. The testimony of Pw1 did not go beyond the occurrence of the accident as there was nothing to show how the suit vehicle was being driven so as to enable the court infer that the accident was caused by want of care on the part of the defendant's driver. I am unable to find whether or not the motor vehicle was driven without due care and attention or at a speed which was excessive in the circumstances. It is also my finding that there is no evidence that the suit vehicle was driven in such manner that the defendant failed to so manage or control the suit vehicle. I, accordingly find that the element of breach of duty of care has not been proven to the required standard. With regard to the damages, that is death, no autopsy report has been presented before the court hence I am not able to tell that the death of the deceased was as a result of the accident.

17. All in all the plaintiff has not proven negligence to the required standard. The plaintiff has not pleaded vicarious liability and the court cannot argue the case on behalf of the plaintiff to find the defendant liable for the acts of its driver. Newbold P. in his judgment in **Muwonge vs. Attorney General of Uganda [1967]**

E.A .C.A said:

"It is not in dispute that the principles of law governing the liability of the Attorney General of Uganda in respect of the acts of a member of... is liable for the acts of his servant committed within the course of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of employment or, in this case within the exercise of the policeman's duty. The acts may be so...done even though they are done contrary to the orders of the master."

18. On aspect of damages to be awarded the general rule regarding measure of damages applicable both to contract and tort has its origin in what Lord Blackburn said in: *Livingstone v Rawyard's Coal Co. (1880) 5 AC 259*. He defined measure of damages as:

"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

19. The Law Reform Act introduced death as a cause of Action for loss of expectation of life and awarded damages as solitum for bereavement. The Fatal Accidents Act introduced a cause of action for the benefit of the members of the family of the deceased for the loss suffered as a result of the death of the deceased which had to be brought by and in the name of the executor or administrator of the deceased or by' and in the names of all or any of the members of the family.

20. In the instant case, the plaintiff's claim for damages for loss and damages was set out in her plaint as that the deceased was in good health aged 57 years earning Kshs 34,830/- and he had 3 sons and one wife. She sought for general and special damages, however no particulars of special damages were given. I am unable to award special damages in that regard and in light of my finding on proof of the case, I deem it unnecessary to venture into the award of general damages.

21. In the result and in view of the foregoing observations I find that the plaintiff has failed to prove her case on balance of probabilities. The suit is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge