



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 1 OF 2016

ESTHER NJERI NJOROGÉ

(Suing as an Administrator on behalf of the estate of the Late

MICHAEL NJOROGÉ KIMANI.....PLAINTIFF

VERSUS

ANGELO KARORI KAMWARO.....1ST DEFENDANT

HERITAGE INSURANCE COMPANY.....2ND DEFENDANT

JUDGMENT

1. By an Amended Plaint dated 14/09/2016, the Plaintiff herein sued the Defendant for special damages amounting to Kshs. 215,000/- (as particularized); general damages including damages for loss of dependency and loss of life and pain and suffering; costs of the suit and interests on the damages and costs.

2. The suit arose from a road traffic accident that occurred on 29/07/2013 along the Limuru-Nairobi road at the Kianjogu area. It involved Motor Vehicle Registration No. KBM 561C, a Toyota Caldina being driven by Michael Njoroge Kimani (Deceased) and Motor Vehicle Registration No. KAR 216B, a Mitsubishi Lorry (the "Mitsubishi Lorry") driven by one Isaac Kimani, a driver employed by the 1st Defendant. The Deceased died on the spot from the injuries sustained from the accident. The suit is brought by the Plaintiff in her capacity as the Administratrix to the Estate of the Deceased.

3. The Plaintiff's case was that the accident was caused solely by the negligence of the driver of the Mitsubishi Lorry.

4. The Defendants filed a Joint Statement of Defence denying the allegations. The suit proceeded to full trial. The Plaintiff called five witnesses and closed her case. The Defence called a single witness then closed its case. The parties then filed Written Submissions in support of their respective cases.

5. Both parties agreed that broadly stated, there are two issues for determination:

a. Was the 1st Defendant's agent (the driver of the Mitsubishi Lorry) negligent and hence responsible for causing the accident in which the Deceased sustained the fatal injuries?

b. If the negligence was proved as (a) above, what would be the proper award of damages?

6. Jane Wanjiku Mbugua is a 53-year old resident of the Kianjogu area. She testified as PW2. She testified that on 29/07/2013 she had come from her work place at Ngara at around 9:00pm. She was in a Tuk-tuk. She alighted besides the road at Kianjogu. She needed to walk for a few metres on the Nairobi-Limuru Road before branching off onto a path to her house. Ahead, she says she saw a lorry. It was, by her rendering, swerving from side to side. On noticing that, she decided to err on the side of caution and moved away from the main road and onto a foot path beside the highway. Upon doing this, she immediately heard a loud bang. Initially, she says she thought that the lorry had rolled. However, when she went back to the road, she saw something at the front. Since it was dark, it initially looked like a stick. The lorry was still moving, dragging the object. It came to a stop about five yards away from her.

7. Ms. Mbugua testified that after the lorry came to a stop, he saw three people alighting and taking off. She also now noticed that the object that was being dragged was a motor vehicle that appeared trapped underneath the lorry. There was a person inside the trapped motor vehicle

who was screaming in pain. It was then that Ms. Mbugua was able to identify the lorry as the Mitsubishi Lorry which belongs to the 1st Defendant and the trapped motor vehicle as the Toyota Caldina which was being driven by the Deceased.

8. Shortly thereafter, a crowd formed and despite their best efforts they were unable to separate the two vehicles to save the Deceased. It was only when a breakdown vehicle came that it became possible to separate the two vehicles. By that time, the Deceased had breathed his last.

9. Both in the examination-in-chief and cross-examination, Ms. Mbugua was categorical that she saw the Mitsubishi lorry swerving from side to side before she heard the loud bang; and that when she went to the accident scene, she found the Mitsubishi Lorry on the right side of the road (on the right lane) and not on its lane. In other words, she testified, the Mitsubishi Lorry had left the left lane where it was supposed to be and drifted to the right lane where the Toyota Caldina was supposed to be and that is where the accident occurred.

10. Paul Wagathuku Ndung'u testified as PW3. He also lives in Kianjogu near where the accident occurred. He testified that he heard a loud bang sound coming from the road on that day. He then heard a woman screaming for help. He rushed to the road. He found that the screaming lady was Ms. Mbugua. She was attracting attention so that people could come and try to save the Deceased who was trapped beneath the Mitsubishi Lorry. They tried to help the Deceased but sooner concluded that he was already dead.

11. Mr. Ndung'u was also quite clear that he found that the Mitsubishi Lorry had moved from the left side of the road where it was supposed to be to the right side where the accident occurred. The accident had occurred on the Mother's Mercy Hospital side of the road – which is the right side coming from Limuru to Nairobi – which is where the Mitsubishi Lorry was heading.

12. Mr. Ndung'u is a mechanic by profession. He told the Court that the Mitsubishi Lorry had lost its tyre about 100 metres before the accident occurred.

13. David Muiruri Kimani, the Deceased's brother and business partner also testified that he found the Toyota Caldina entangled with the Mitsubishi Lorry on the right side of the road facing Ruaka when he arrived at the scene.

14. The last Plaintiff's witness to testify on how the accident occurred was PC Charles Njung'e, a Policeman attached to Karuri Police Station performing traffic duties. He was not on duty when the accident occurred; and he did not investigate the accident. His only task was to produce the Police Abstract (Exhibit 8) and the extract of the Occurrence Book (Exhibit 20). From the documents he produced, he could authoritatively confirm that the accident occurred on 29/07/2013. The two documents only confirmed that the "case was pending before Court" and that it was being investigated by a Sgt. Kirigu. Neither documents places the blame for the accident on either drivers.

15. On cross-examination, PC Njung'e stated that as at September, 2015, no conclusion had been arrived as to who caused the accident. He did not know if anyone was charged following the accident. He was not aware if the driver of the Mitsubishi Lorry had been given police bail and then required to report to the Police Station which he did faithfully for two years before he was told to stop reporting as no charges were contemplated.

16. PC Njung'e conceded that he did not have the entire file because it was sent to the Provincial Traffic Police Headquarters. As such, he had not sketch maps of the accident. On cross-examination, he said he had been unable to trace Sgt. Kirigu to come and testify about what he knew about the accident. He disagreed with the Defendant's lawyer's theories about how the accident occurred.

17. On their part, the Defendants called Isaac Kimani, the driver of the Mitsubishi Lorry on the material day to the witness dock. His story was that he was ferrying goats in the Mitsubishi Lorry on that day. He was, he said, driving at a moderate 55 Kms per hour when he go to the Kianjogu area at around 8:30pm. He was with his assistant, John Nderitu. He recalled that it was drizzling and that he had his head lights on. He saw a motor vehicle coming towards him in very high speed. The motor vehicle was, Isaac insisted, on his (the Mitsubishi Lorry's) lane. Isaac says he tried to flash his lights but the driver of the other motor vehicle did not respond. As a result, the vehicles collided head on (on his side of the road), he testified. However, Isaac testified that due to the impact, the vehicles moved to the opposite side and that is how they ended up on his right lane.

18. Isaac conceded that he ran away from the scene. This was because, he says, he panicked. He says he stood by the side of the road and when the worked up crowd started asking who the driver of the Mitsubishi Lorry was, he feared that they would lynch him. Isaac testified that he went to report at Ndenderu Police Post and they called Karuri Police Station and asked them to send officers to the scene.

19. Isaac insisted that none of his tyres had come out before the accident and that it was his axle that broke as a result of the accident. He disagreed with the Motor Vehicle Inspection Report produced as an exhibit which indicated that the axle was twisted and damaged; he persisted that the axle broke and came out.

20. Isaac also denied that he had been arrested that night although he conceded that he spent the night at Karuri Police Station. He insisted that he spent the night at the Reporting Office; and, apparently, not in the Police Cells. He was unaware if his employer, the 1st Defendant, had posted any bail for him at the Police Station.

21. The Defendants submit that on the evidence received in Court, only one conclusion is possible: that the Plaintiff has not proved its case to the required standard. In making this submission, the Defendants remind the Court that it was the Plaintiff (as the one who alleged negligence) who was, by dint of section 107 of the Evidence Act, required to prove it. They relied on *Dorcus Wangithi Nderi v Samuel Kiburu Maina & Another (Embu High Court Civil Case No. 58 of 2013); eKLR [2015]* as well as *In re H (Minor) [1996] AC 563* – an English decision.

22. The Defendants insist that looking at the narration of events as presented by the sides, it more probable that the driver of the Toyota Caldina was to blame for the accident despite the copiousness of the evidence by the Plaintiff. The point is not copiousness of the evidence; but the probability that it is the more likely version of what happened. The Defendants argue that looking at the places where the two

vehicles were damaged, the Court should believe the Defence's version of the events. In particular, the Defendants insist that the available photos of the two vehicles at the Police Station where they were towed to indicates that "it was probable that the wheels of the [Toyota Caldina] were turned right at the point of impact meaning it was being steered right onto the path of the oncoming [Mitsubishi Lorry] and that the front side axle of the [Mitsubishi Lorry] was damaged.

23. Additionally, the Defendants point out that it was only their witness (Isaac) who was at the accident scene when the accident occurred; since the two Plaintiff's witnesses in this regard came to the scene after the accident had occurred. Further, the Defendants would like the Court to draw an inference from the fact that Isaac was not charged with any traffic offence.

24. It is, of course, true that he who alleges must prove in order to prevail in a civil claim. The question is whether it can be said, on the evidence tendered by the Plaintiff, she proved negligence on a balance of probabilities – for that is the required standard.

25. The critical question is whose version of the story is more probable. Looking at the facts of this case and all the evidence produced, I have come to the considered conclusion that the Plaintiff's story is not only more believable but that it established the fact of negligence to the required standard. I have come to this conclusion for at least three reasons:

a. First, even though Ms. Mbugua (PW2) did not see the exact moment of impact of the two vehicles but only heard it, she testified in a straightforward and credible fashion that she had seen the Mitsubishi Lorry swerving from one side of the road to another as it sped towards her moments before the accident. Indeed, she vividly remembered this because she decided to move away from the main road for her own safety given how the Mitsubishi Lorry was being driven. It should be noted that Ms. Mbugua is a disinterested witness who has no stake in the outcome of the case. It should be further noted that her evidence about the Mitsubishi Lorry swerving from one side of the road to the other is corroborated by and aligns with the evidence of Mr. Ndung'u (PW3) who testified that the Mitsubishi Lorry had lost its tyre about 100 metres away before the point of impact.

b. Second, the Defendant's theory that the Deceased had left his side of the road and was on the right lane as one heads towards Limuru (as opposed to the left lane) is impugned by the fact that the Deceased's car was hit on the right side. That kind of damage is not in keeping with a head-on collision as the Defendant's witness claimed.

c. Third, if the accident was a head-on collision, and given the relative size of the two vehicles, it is implausible that the accident occurred on the Mitsubishi Lorry's left side of the road and then the two vehicles verged towards the right side of the road until they rested on the right side. That would only have been possible if the Toyota Caldina could somewhere exert enough force to drag the lorry towards the right side. That is a logical impossibility. In any event, the clear evidence of Ms. Mbugua (PW2), who I believe, was that it was the Mitsubishi Lorry which was dragging the Toyota Caldina after the accident.

d. Fourth, the documentary evidence tendered (Inspection Report) shows, contrary to the evidence of the Defence Witness (Isaac), that the axle of the Mitsubishi Lorry did not break as the Defence Witness claimed. It was merely damaged and twisted following the impact. Isaac's explanation why the Mitsubishi Lorry found itself on the right side of the road, is, therefore, untenable.

e. Fifth, the fact that the driver of the Mitsubishi Lorry was not charged with a Traffic Offence is not dispositive at all on the question whether the driver was negligent or not in causing the accident. As Aburili J. explained in *Mary Njeri Murigi v Peter Macharia & Another [2016] eKLR*, the disparate standard of proof in criminal and civil cases coupled with the fact that charging decisions in traffic cases do not lie with the Plaintiff is sufficient answer to this submission.

f. What about the submission by the Defendants that the position of the wheel as seen in the photographs in the Inspection Report would tend to show that the Deceased was in the act of steering right when the accident occurred? I have found this to be of little probative value because there is testimony on record that the motor vehicles were towed to the Police Station before the photographs were taken. There is not telling whether the wheels turned to face a different direction during the towing. Only expert evidence to establish that the wheels were turned in a particular direction at the point of impact would have sufficiently advanced this line of reasoning. None was tendered.

26. In the circumstances, I am satisfied that the accident was solely a result of the negligence of the driver of the Mitsubishi Lorry.

27. I will now turn to the quantum of damages.

28. I will begin with the special damages. The Plaintiff pleaded special damages of Kshs. 215,100/-. During the trial, the Plaintiff (PW1) produced documents showing the following particularized expenses following the demise of the Deceased:

- a. Towing expenses – Kshs. 45,000/- (Exhibits 9A and 9B)
- b. Funeral expenses – Kshs. 169,500/- (Exhibits 10A; 10B and 11)
- c. Police Abstract – Kshs. 100/- (Exhibit 8)
- d. KRA search expenses – Kshs. 500/- (Exhibit 15)

Total – Kshs. 215,100/-

29. Under the heading pain and suffering, the Plaintiff has proposed Kshs. 100,000/- (relying on *Francis Wainaina (Suing as Personal Representative of the Estate of John Karanja Wainaina) v Elijah Oketch Adallah [2015] eKLR*) while the Defendants have suggested

Kshs. 50,000/- (relying on the same case!). In the cited case, the Learned Judge actually awarded Kshs. 50,000/- for loss and suffering of a person who died immediately after the accident and not Kshs. 100,000/- as submitted by the Plaintiff. Still, I would award the higher figure of Kshs. 100,000/- here due to the circumstances. The Plaintiff did not die on the spot. He was dragged by the Mitsubishi Lorry for some time; and remained alive for a while calling for help while trapped in the mangled wreck beneath the Mitsubishi Lorry.

30. On the loss of expectation of life, the Defendant's counsel suggests an award of Kshs. 80,000/- given that the Deceased was 33 years old. He relies on the Francis Wainaina Case (supra) where Kshs. 100,000/- was awarded to the estate 28-year old Deceased victim three years ago. The trend in our Courts is to award Kshs. 100,000/- for middle-aged victims under this heading. I will stick with the trend.

31. There is much controversy on how to compute for loss of dependency. The Plaintiff submitted that the Deceased was 33 years old and of good health and that he was running a business with his brother. She produced a Directors' Agreement (Exhibit 18) which showed that he was entitled to a salary of Kshs. 225,000/-. She also produced the Bank Statements of the Company which showed the inflows and outflows into the Company account.

32. The Deceased was a married man who took care of his family of one wife and three minor children. He was the sole bread winner. He also took care of his mother. Thus, the Plaintiff proposed a dependency ration of two-thirds (2/3).

33. Based on this figures, the Plaintiff also proposed a multiplier of 27 years arguing that the Deceased would have worked until at least he turned 60 years old. The Plaintiff, therefore, proposed the following award:

$$\text{Kshs. } 225,000/- \times 12 \text{ months} \times 27 \text{ years} \times 2/3 = \text{Kshs. } 48,600,000/-.$$

34. On their part, the Defendants argue that despite all efforts to show that the Deceased was earning Kshs. 225,000/- and with a promising future, it was evident that the business responsible for generating the Deceased's income was "going south even before the accident occurred." The Defendants insist that it was just a matter of time before the business went bust. As such it would be too speculative to use the figure of Kshs. 225,000/- as the projected income of the Deceased.

35. The Defendants insist that no evidence was placed before the Court to show any evidence of what other vocation or gainful occupation that the Deceased would have engaged in "after the collapse of Limlines Cargo". The Defendants, hence, urge the Court to use the minimum wage as what the Deceased would have earned for the rest of his life as the basis for computing the income his estate has been deprived of.

36. I will begin with the observation which was clearly brought out by the evidence of Mr. David Kimani (PW4) and the bank statements produced in Court: the indebtedness of the Company which the Deceased's company was running (Limlines Cargo) was increasing and had markedly increased between 2010 and 2013 just before the unfortunate death of the Deceased. The question becomes how the Court should respond to this. The Defendants insist that this downward trend means that it would be speculative to use the figure of Kshs. 225,000/- as the projected income; and that instead the Court should use the minimum wage. On the other hand, Mr. David Kimani (PW4), on cross-examination had this to say:

After 2012 the indebtedness shoots up. I paid the debt until it got to zero. The business had challenges but we were feeling that we were at the take off stage. We did not have any document spelling out what the hope was based on...It is possible that the salary [the Deceased] was earning could have dried up. But it could have increased. I do not agree that it could have dried up – but [the Deceased] had the drive and energy to drive the business. The business could have done very well. We cannot quantify those values...It is [also] a possibility that the business could fold....

37. After analysing all the evidence presented and the duelling submissions of the parties, I note the following:

a. While the Plaintiff produced the Directors' Agreement stipulating that the Deceased was entitled to a monthly salary of Kshs. 225,000/-, no other documentation was produced to actually show that the business was ever able to generate and sustain this salary. In particular, no pay slip was produced and no withdrawals from the bank accounts showing the salary payments was produced or shown. Similarly, the Company's books of accounts showing the salary payments was not produced even though the only other surviving director, Mr. David Kimani testified as PW4.

b. Secondly, no tax returns for either the Company (showing the monthly sum of Kshs. 225,000/- as an expense) or the Deceased (showing an income of Kshs. 225,000/-) was produced as evidence.

c. Thirdly, in any event, even if the Deceased's salary was Kshs. 225,000/- there was a need to deduct the income tax applicable to the tax.

d. Fourthly, the bank statements produced and the viva voce evidence of Mr. Michael Kimani showed declining business income for the company. The Plaintiff did not produce any basis for the conclusion that the business would have done better in the coming days other than "hope". There was a need to provide a basis for the business projections either based on similar businesses or the particular model of business the Company was engaged in. Without this, the Court will simply be called to engage in speculation.

38. Having made these observations, I am, therefore, unpersuaded that the Deceased's income to be used to estimate the loss of dependency should be Kshs. 225,000/-. We must, however, recall that the multiplier method is only a method not a dogma (see *Albert Odawa V Gichimu Gichenji Nakuru HCCA 15/2003 [2007] eKLR*). **The aim is to approximate what loss the estate of the Deceased has suffered following the wrongful death of the Deceased. It is, of course, not possible to come up with a precise figure for the loss. The Court merely tries to use all available evidence to come up with a figure which is fair and reasonable in the specific circumstances of the case. Where that is absolutely not possible, the Court resorts to the minimum wage as a last resort.**

39. In the present case, the bottom line is that the Deceased was a family man and the bread winner of his family at the time of his death. Most of his income went to supporting his family. We also know that the Deceased's children had a comfortable living and that his children attended a private school where he paid school fees of Kshs. 30,000/-; Kshs. 18,600/- and Kshs. 11,900/- per term. While it is true that there are no scientific projections to conclude that the business could have done well in the face of its declining fortunes, there is also no telling whether the Deceased could have turned the fortunes of that company around given his drive and resourcefulness.

40. Instead, therefore, I will simply try to estimate what the actual dependency to the estate was using the available figures. I will first take into account that the Deceased was paying school fees of approximately Kshs. 60,000/- per term which translates to approximately Kshs. 20,000/- per month. I will then assume that, generally, parents aim to spend no more than a third of their monthly income on the education of their children given the other needs of the family. This will mean that the likely monthly disposable income that was available to the family of the Deceased was Kshs. 60,000/-. I will use this figure to calculate loss of dependency. It is the actual loss of dependency, there will be no need to reduce it by any particular dependency ratio.

41. The calculation for loss of dependency will then work out as follows: Kshs. 60,000/- x 12 months x 27 years = Kshs. 19,440,000/-. This is the amount I will award to the estate of the Deceased for loss of dependency. In making this calculation, I accepted the multiplier of 27 years as reasonable given that the Deceased was 33 years old. As the Plaintiff argues, it is reasonable to expect that he would have led a healthy productive life until he turned at least 60 years old.

42. There is one other issue which was not directly by the parties but I wish to touch on. The Plaintiff seeks damages under both headings of "loss of expectation of life" and "loss of dependency". There have been some suggestions in Kenya that it is improper to do so because it leads to a double award to the Plaintiffs since the persons benefitting from the estate of the Deceased are the same.

43. However, the correct position in Kenya is that enunciated by *Kemfro v A.M. Lubia & Another [1982-1988] KAR 727* thus:

The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

44. In this same case, in a separate concurring opinion, Chesoni Ag JA (as he then was) held that "to be taken into account and to be deducted are two different things [and that] the words used in Section 4(2) of the Fatal Accidents Act are 'taken into account'." However, the position taken by our Courts is that absent special circumstances a Court will demonstrate that it has "taken into account" by deducting the amount awarded under the Law Reform Act from the award for loss of dependency under the Fatal Accidents Act. I have suggested before that where the multiplier method has been used, unless the Trial Court expressly explains that it has chosen a lower figure to use as a multiplicand, multiplier or ratio pursuant to the statutory admonition under section 4(2) of the Fatal Accidents Act, it would be assumed that it did not "take into account" the award under the Law Reform Act.

45. In the circumstances of this case, I think the amount awarded under the Law Reform Act should be not be deducted from the award under the loss of dependency. This is because even though there was evidence that the Deceased was entitled to earn Kshs. 225,000/- per month, due to the specific circumstances of this case, the Court used a lower figure as the multiplicand because of lack of solid basis for future projections that the monthly earnings will remain the same.

46. **The upshot, then, is that judgment shall be entered against the Defendants jointly and severally for the following sums:**

- a. **Special Damages – Kshs. 215,100/-**
- b. **General Damages for Pain and suffering – Kshs. 100,000/-**
- c. **General Damages for loss of life – Kshs. 100,000/-**
- d. **Loss of Dependency – Kshs. 19,440,000/-**

Total – Kshs. 19,855,100/-

47. Orders accordingly.

Dated and delivered at Kiambu this 26th Day of October, 2018.

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JOEL NGUGI

JUDGE