REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 181 OF 2011

CAREN AUMA OYUGI OKWIRI *(Suing as the personal representative of the*

***estate of JONATHAN OKWIRI CHIRA [Deceased])*.....PLAINTIFF**

VERSUS

EMERGENCY RELIEF SUPPLIES LTD *alias* PHILIP ANGEL.....1ST DEFENDANT

CLIFFORD OTIENO WAHONYA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff has sued the defendants vide a plaint dated 18th May, 2011 seeking recovery of damages arising from an accident alleged to have occurred on 13th July, 2008. The plaintiff has brought this suit under the ***Fatal Accidents Act and Law Reform Act*** on her own behalf and for the benefit of the deceased' estate.

2. She alleged that the deceased was on the material day lawfully walking along and off the verge of Mbagathi – Lang'ata road when at Caltex petrol station the 2nd defendant negligently drove motor vehicle registration number KAE 191K ('*the vehicle'*) that it lost control and hit the deceased. She sued the 1st defendant as the registered owner of the vehicle and the 2nd defendant as the owner in user and or in actual possession of the vehicle.

3. It was alleged that the deceased was aged 28 years at the time of his demise and he enjoyed a healthy life. That he was self-employed as a mechanic based in Nairobi with his daily income alleged to be about KShs.1,500/=. In the alternative the plaintiff pleaded income as per the minimum wage under the prevailing Regulation of wages and conditions of Employment Act (Cap 229). It is stated that he was the sole bread winner to his peasant parents, wife and child. A claim for special damages in the sum of KShs.134,800/- was made.

4. The defendants filed a statement of defence in which they denied the plaintiff's claim.

5. At the hearing of the case, the plaintiff who was the deceased's wife testified that the deceased was a panel beater and was earning KShs 1,500/= per day. She stated that they had one child, John Juma Okwiri aged 3 years at the time of the accident. That the deceased was the family's sole bread winner and also used to support his parents though the father later died. She produced a demand letter, copy of official search, death certificate, grant of letters of administration, police abstract, 2 copies of chief's letters dated 11th February, 2010 and 7th January, 2011, bundle of receipts for mortuary charges and funeral expenses, advocate receipt for letters of administration and notice of institution of suit to Kenya Orient Insurance

Co. Ltd as P. Exhibit 1 to 10 respectively. She stated that she did not witness the occurrence of the accident.

6. Charles Odhiambo Odundo (PW2) testified that he worked with the deceased at the same garage. He stated that they used to earn about KShs.1,000 to KShs.1,500/= depending on the flow of customers.

7. Corporal Joshua Nzioka Kyuli testified as (PW3). He was not the investigating officer rather he had come to court to produce the police abstract on behalf of the investigating officer who had been transferred to another station. He confirmed the occurrence of the accident. He told the court that he was familiar with the road where the accident occurred and stated that there was no zebra crossing or footbridge at the point. It was his evidence that the Occurrence book did not indicate the point at which the accident occurred. He stated that as one approaches the round-about, he/she should slow down and that at the speed of 50 KPh, a driver should be able to avoid an accident.

8. Charles Owino Odongo (PW4) testified that, he was on the material day, repairing his client's car along Mbagathi road when he heard screech from a vehicle that had applied brakes. He went to find out what had happened. That he saw the deceased who had been hit lying down and he was still breathing. It emerged from his evidence that there was no zebra crossing and that the foot bridge was far. He told the court that he often uses that road and that in the mornings and evenings there is normally a man who controls the vehicles to allow the children to cross the road. According to him, the vehicle seemed to have been moving at a high speed since he heard emergency brakes.

9. On cross examination, PW4 stated that he had known the deceased for about two (2) weeks since he had worked at his garage for that period. He however stated that he did not witness the accident.

10. The 2nd defendant testified that he was, on the material day, driving the subject vehicle along Mbagathi road. That he was descending towards the junction at T-Mall shopping center. He was driving in the inner lane when the deceased suddenly emerged from the central reservation. The vehicle that was in front of his vehicle swerved and he [2nd respondent] hit the deceased. He stated that the deceased suddenly appeared ahead of his vehicle. That the traffic was fairly busy and he was driving at 50–60 kph.

11. It was his evidence that he completely swerved to avoid hitting the deceased but the deceased approached the vehicle and was hit. He denied that he was driving at a high speed and contended that had he been driving at a high speed, his vehicle could have rolled. He stated that following the accident the bonnet and the bulbar of his vehicle were damaged. He told the court that he has not been charged in any traffic case with regard to this accident. He laid blame on the deceased stating that he did not cross at the right place. According to him, the deceased should have used the zebra crossing at the round-about or the footbridge. He told the court that the accident occurred so fast that he did not see the deceased before the accident.

12. On cross examination, the 2nd defendant confirmed that the accident was fatal. He stated that the distance from the petrol station to the foot bridge was about 100 meters. It was his evidence that he was going to the airport to pick someone but he had enough time as he was 2 hours early.

13. The court has carefully considered the pleadings and the evidence on record. I note that there is no dispute as to the occurrence of the accident or ownership of the vehicle. The only issues for determination are liability and quantum. I shall therefore consider the submissions with regard to the two issues.

14. On the issue of liability, it was the plaintiff's submissions that the plaintiff's witnesses confirmed that the 2nd defendant was negligent since he was driving too fast in the circumstances. It was submitted that from the 2nd defendant's own testimony, the deceased was thrown off the bonnet and landed on the tarmac in front of his lane and that his vehicle stopped about 15 meters from the point of impact from which it could be inferred that he was driving fast. It was argued that it was impossible to swerve away from the deceased and hit him with the bonnet. The plaintiff cited the Court of Appeal decision in ***BASHIR AHMED BUTT V UWAIS AHMED KHAN, [1982-88] 1 KAR 1 & [1981] KLR 349*** where it

was held:

> ***"High speed can be prima facie evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for traffic offence. It is another matter as far as the question of negligence is concerned…The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence."***

15. The plaintiff asked the court to find the 2nd defendant 100% liable for the accident.

16. The defendants on their part, made reference to the evidence on record and argued that it was not enough to say that an accident occurred. They submitted that the plaintiff ought to have brought an eyewitness to demonstrate that the 2nd defendant was negligent. They cited the case of ***SPELLMAN & WALKER COMPANY LTD V ANITA WILSON, [2000] eKLR*** where it was so stated and ***JAMAL RAMADHAN YUSUF & ANOTHER V RUTH ACHIENG ONDITI & ANOTHER, [2010] eKLR*** where the court observed:

> ***"it is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove."***

17. It was submitted that the deceased knew the risk of crossing the road without ascertaining that the same was clear and as such voluntarily assumed the risk that befell him. That it is trite that a pedestrian owes a duty to other road users to move with due care and to conduct himself in a way not to endanger the lives of other road users. The 2nd defendant cited ***Part 1 of the Highway code of conduct*** that provides:

> ***"Before you cross the road, stop at the kerb, look right, look left, and right again. Do not cross until the road is clear; then cross at right angles, keeping a careful look out all the time. If there is a refuge, stop on it and look again. On one-way traffic road, stop and look towards oncoming traffic before you cross. Do not cross unless you have a clear view of the road both ways. Take extra care near stationary vehicles or other obstruction, and whenever your view is limited."***

18. In ***KARANJA V MALELE, (1983) KLR 147*** the Court of Appeal held inter alia that:

> ***"There are two elements to be considered when assessing the issue of liability namely causation and blame worthiness; there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence in not seeing it before hand; and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion."***

While I acknowledge the fact that the 2nd defendant had a lethal machine, it is noteworthy that he could not have expected anyone to suddenly get into the road. In this regard I share the same opinion as was observed in ***JOSEPH MUTURI KOIMBURI V MERCY WAHAKI MUGO, (2006) eKLR*** where it was held:

> ***"Having found that the respondent was hit while crossing the road, the lower court then was wrong in apportioning liability and finding the appellant 70% to blame. In my view, the respondent was fully to blame for her reckless behavior in attempting to cross a busy dual carriage way at that time of the night. When in fact the foot bridge was available for that purpose, in fairly close proximity. Any driver of ordinary prudence is not expected to find pedestrians on that part of the road, at that hour of the night, and the appellant could not possibly be blamed for that accident. I adopt the reasons for the court in a similar situation in***

the case of *Waindi v Pharmaceutical Manufacturing Co Ltd, [1986] KLR 506**."***

In the ***Waindi case (supra)*** *the Court of Appeal held:*

> ***"there is no doubt whatsoever as to how the accident occurred. There is nothing inexplicable about it. The appellant dashed in front of the combi putting the second respondent in the agony of the moment."***

19. The evidence by the plaintiff's witnesses has put this court in an awkward situation with regard to the issue of liability. None of the witnesses has shed light on how the accident occurred as there was no eye witness. Their evidence has done nothing much to assist the court in arriving at a decision on who was to blame for the accident and if both the deceased and the 2nd defendant were to blame, the degree of blame to be attributed to each of them. The court is not in a position to tell at all at what point of the road the deceased was hit by the vehicle. On the other hand, the 2nd defendant who testified as DW1 heaped all the blame on the deceased whom he says suddenly dashed on the road. I share the same sentiments with the court in the case of ***Jamal Ramadhan Yusuf & Another V Ruth Onditi, [supra]***, that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who alleges must prove. In the circumstances, I do not find the defendants liable for the accident and it's very unfortunate that I have to dismiss the case.

20. I am required to assess damages to ascertain what the plaintiff would have been entitled to in the event he had succeeded in this suit. On quantum, the plaintiff urged the court to use a multiplicand of KShs.1,500, a multiplier of 32 years and a dependency ratio of $^{2}/_{3}$. The plaintiff relied on ***JACOB AYINGA & ANOTHER V SIMON OBAYO, (2005) eKLR***, ***MILLICENT KIMULI & ANOTHER V MBISHI LINAH CATHERINE & ANOTHER, (2013) eKLR***, ***MILDRED AORI ODUNGA V HUSSEIN DAIRY LIMITED, (2010) eKLR***, ***JAMES GICHURU KIUNJURI & ANOTHER V MAINYO INVESTMENT LTD,*** and ***KEATS NJUGUNA MUCHIRI V MASH EXPRESS LTD, (2008) eKLR***. On loss of consortium, the plaintiff submitted that she was a young wife and has been deprived of the companionship of her husband and she sought KShs.150,000/=. On damages under the Law Reforms Act, damages of KShs.200,000/= was suggested for loss of expectation of life, KShs.30,000/= for pain and suffering and nil for lost years considering that she has prayed for an award of loss of expectation of life.

21. The defendant on the other hand stated that there was no evidence that the deceased suffered any pain since he died on the same day and should not be awarded for pain and suffering. He suggested KShs. 70,000/= for loss of expectation of life. Under loss of dependency, he suggested a multiplicand of 3,000/=, a multiplier of 10 years and ratio of $^{2}/_{3}$. The defendant warned the court against double enrichment and argued that there ought to be a discount on the award under the Fatal Accidents Act in view of the award made under the Law Reforms Act.

22. In ***PAULINE NYABOKE NYAMORA AND ANOTHER (Suing as the Legal Rep of the Estate of Dishon Ogachi Nyamora V NAOMI WAIRIMU KURIA, NKR HCCC NO. 457 of 2000,*** Maraga, J *[as he then was],* awarded KShs.25,000/= for pain and suffering where the deceased suffered fatal injury in a road traffic accident and died on the way to hospital. I in this case award KShs. 30,000/=.

23. In ***ANWARALI BROTHERS LIMITED & ANOTHER V JOYCE MUNDI & ANOTHER, MCKS HCCA NO. 126 OF 2007,*** Lenaola, J *[as he then was],* applied a multiplier of 18 years for a 32 year old because the deceased would have worked till the age of 50 years. The deceased in this case would have worked upto the age of 60 years considering the retirement age. I find 25 years reasonable bearing in mind the vicissitudes of life and a multiplicand of KShs.1,000/- for 25 days in a month.

24. I would have applied the dependency ratio of $^{2}/_{3}$ considering that the deceased was the sole bread winner to his family and aided his parents. The plaintiff's suggestion of KShs.200,000 for loss of expectation of life is a bit too high and the court would have awarded KShs150,000/-.

25. In total, this court would have entered judgment for the plaintiff as follows:

a) Damages for loss of expectation of life	KShs. 150,000/-
b) Pain and suffering	KShs. 30,000/-
c) Loss of dependency $^{2}/_{3}$ x 25 x 12 x 25,000	KShs.5,000,000/-
d) Special damages	KShs. 134,800/-
Total	**KShs.5,314,800/-**

Dated, signed and delivered at Nairobi this 20th day of April, 2017.

……..

L. NJUGUNA

JUDGE