



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 413 OF 2007

BARTHOLOMEW BERNARD OSODO & JACOB

OTIENO(Suing as the administrators of the estate of

RICHARD OMONDI ODHIAMBO (DECEASED).....PLAINTIFFS

VERSUS

JIMCAB SERVICES LIMITED DEFENDANT

JUDGEMENT

1. On 10th October 2005, the late Richard Omondi Odhiambo was knocked down and ran over by motor vehicle registration no. KAT 116K along Juja road within Nairobi city. He was fatally injured as a result of the aforesaid accident. Bartholomew Bernard Osodo and Jacob Otieno the plaintiffs and legal representatives of the estate of Richard Omondi odhiambo, deceased, filed this suit against **Just In a Moment Cab services (JIM CAB)** the defendant, the registered proprietor of motor vehicle registration no. KAT 116K claiming damages under the Law Reform Act and the Fatal accidents Act. The defendants filed a defence to deny the plaintiffs' claim.
2. When this matter came up for hearing the plaintiffs summoned two witnesses in support of their case while the defendant closed its case without summoning witnesses to testify in support of its case. It is the evidence of Peter Ochieng Maina (PW 2) that on 10.10.2005 at around 10.00am he boarded a matatu from Kariobangi heading to Mathare Estate. PW 2 said that while approaching the junction between the chief's camp, the turn off to Huruma and the road leading to Kariobangi round about, he witnessed motor vehicle registration no. KAT 116K which was ahead of them attempt to overtake another motor vehicle. There was another on coming motor vehicle and in order to avoid a head on collision KAT 116K veered off the road into the pedestrian walkway. PW 2 further stated that the aforesaid motor vehicle knocked down the deceased who was standing at the bus stage while trying to get back to the road. PW2 together with other passengers alighted to check on what had happened and managed to convince the driver of the taxi to take the deceased to hospital. Bartholomew Benard Osodo (PW 1), informed this court that he was the deceased's nephew. PW1 said that when he was informed about the accident he reported the same to Pangani Police Station where he was issued with a police abstract form showing the details of the motor vehicle involved. PW1 produced documents showing that the family was slapped with a bill by Kenyatta National Hospital of kshs.16,965/=. He also produced a receipt for kssh.10,000/= spend in purchasing the coffin and kshs.34,500/- on the hiring of a hearse. This witness further tendered in evidence a copy of the limited grant of the letters of administration.
3. PW1 stated that the deceased worked with Kariobangi Metal Works as a welder earning a monthly sum of kshs.9,280/-. The petty cash voucher and letter of employment of the deceased was issued

by his employer were marked for identification. PW1 told this court that the deceased died at the age of 21 years. Mr. Oluoch, learned advocate for the plaintiff beseeched this court to allow PW1 to produce the aforesaid documents as exhibits in evidence because the maker was critically ill. PW1 tendered documents showing that Paul Ouko Dawo, the owner of Kariobangi Metal works was suffering from a chronic disease. On the basis of the aforesaid documents this court was urged to admit the petty cash vouchers and the letter of employment. Mr. Obel, learned advocate for the defendant's had initially objected to the production of the aforesaid documents on the basis that the maker had not been summoned to attend court. The learned advocate did not later raise any objection when the witness (PW1) was called to produce medical records showing the deceased's employer was critically ill.

4. I have considered the rival submissions over the question as to whether or not I should admit the aforesaid documents in evidence. Under section 35 (b) of the Evidence Act, the court is mandated to admit such documents without the head of calling the maker if having regard to all the circumstances of the case it is satisfied that the maker is dead or cannot be found or is incapable of giving evidence or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable. In the case before this court, PW1 has presented documents showing that the proprietor of Kariobangi Metal Works where the deceased worked as a welder has relocated to Homa Bay where he is being treated for a chronic illness. In fact PW1 had to be stepped down from the witness box to enable him secure the medical treatment notes showing Paul Ouko Dawa is critically ill.
5. I have no reason to doubt the veracity of those documents. Consequently I order that the documents marked as P.M.F.I 6 and P.M.F.I 7 are admitted in evidence PEXH. 6 and PEXh 7.
6. At the close of evidence, learned counsel were invited to file written submissions which they did. I have considered the rival written submissions plus the evidence tendered.
7. Two main issues have arisen for the determination of this court. First, is whether or not the defendant is liable for the accident. Secondly, is whether or not damages are payable and if yes what is the extent of the quantum?
8. On the first issue, the defendant is of the view that the deceased should shoulder 40% liability while the defendant should shoulder 60%. The plaintiffs are of the view that the deceased was not at fault hence he cannot be accused of contributory negligence. I have carefully considered the evidence of PW2, the eye witness. PW2 clearly stated that he was in front of a matatu where he observed KAT 116K overtake and swerve when the driver realized he was about to have a head on collision with another motor vehicle. The aforesaid motor vehicle is said to have veered off the road thus knocking down the deceased at the pedestrian walkway. The evidence of PW1 was never controverted. I have no reason to doubt its veracity. In the circumstances of this case liability cannot be apportioned. The deceased was knocked down while lawfully walking on the pedestrian walkway. The defendant is therefore found to be wholly to blame.
9. On quantum, the defendant proposed that since the deceased was a general labourer, the minimum wage at the time i.e kshs.4,638/= should apply instead of kshs.9,280/= I have already made a decision admitting the evidence showing that the deceased worked as a welder with Kariobangi Metal Works on a monthly salary of kshs.9280/=.
10. In the circumstances, there is no need to apply the minimum wage. I am satisfied that the applicable monthly pay is kshs.9,280/=. The defendant proposed that the deceased was expected to retire upto reaching the age of 60 years.
11. I have already stated that the multiplier of 9,280/= was suggested and accepted by this court as the actual amount the deceased received as a monthly salary.
12. In the end I award kshs.2,895,360/= for lost years calculated as follows:

9,280x12x2/3x39=2,895,360/=

13.The defendant proposed payment of 150,000/= to cover loss of expectation of life. The plaintiffs on the other hand have proposed payment of ksh.350,000/=. I have considered the trend of awards in cases of similar and I think that a conservative sum of kshs.100,000/= is sufficient.

14.The other prayer is for pain and suffering. The defendants proposed a sum of kshs.10,000/=. The plaintiff suggested kshs.300,000/=.

15.On my part and looking at the pleadings and the evidence, it is clear in my mind that the deceased did not die on the spot but had to be taken first for medical treatment at Kenyatta National Hospital where he passed on.

16.I am satisfied that the deceased suffered great pain immediately after the accident. On this head I will award him kshs.150,000/=

17.On special damages both sides agree that the plaintiffs tendered evidence proving the same to be ksh.68,965/=.

18.In the end I enter judgement in favour of the plaintiff in the

following terms:

- i. Special damages - kshs.68,695/=
- ii. Pain and suffering - kshs.150,000/=
- iii. Lost years - kshs.2,895,360/=
- iv. Loss of expectation of life - kshs.100,000/=

Grand total - kshs.3,214,055/=

v. Costs of the suit

vi. Interest at court rates from the date of judgment until full settlement of the decree

Dated, Signed and Delivered in open court this 19th day of February, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendant