



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM.CASE NO. 248 OF 2011

**ALEJANDRO CAMPON (SUING AS THE HOLDER OF THE POWER OF ATTORNEY FOR
BAUTUTA BUENDIA VALENTIN AND MARIS DOLORES MARTINEX AS THE
ADMINISTRATOR OF THE ESTATE OF THE LATE ESTHER BUENDEI MARTINEZ AS
THE ADMINISTRATOR OF THE ESTATE OF THE LATE ESTHER BUINDIE
MARTINEZ.....PLAINTIFF**

VERSUS

(1) SWALEH BROK ISLAMDEFENDANT

(2) MASH BUS SERVICES LIMITED.....DEFENDANT

JUDGMENT

Outline

1. On 2.9.2008, one ESTHER BUENDIA was travelling aboard motor vehicle Reg. No. KAX 627T, as a fair paying passenger when at Taita village, there occurred a collision between that motor vehicle and another KBA 449Q hauling trailer ZB 9813. As a result of the collision the deceased suffered fatal injuries from which she died on the spot.

2. The plaintiff is the donee of power of attorney from BAUTISTA BUENDIA VALENTIN and MARIA DOLORES MARTINEZ who are the administrators of the estate of the deceased having been granted grant of letters of administration in MOMBASA HC. SUCC.CAUSE NO. 135 OF 2011.

3. In the suit, the Plaintiff claims general and special damages under both the Law Reform Act as well as the Fatal Accidents Act on behalf of both the estate and the dependants of the deceased.

Pleadings

4. By the plaint dated 8/7/2011 and later amended on 5/9/2011 the plaintiff blames the 1st defendant as the driver and a person in control of the motor vehicle Registration NO. KAX 627T as well as the 2nd defendant for being vicariously liable as the registered owner of the motor vehicle for the accident and resultant damage. The particulars of negligence, particulars pursuant to Fatal Accidents Act as well as particulars of special damages were pleaded at paragraphs 6,8, & 9. The totality of the plaintiffs claim is that at the time of her death the deceased was aged 25 years, employed as a newscaster/journalist with a leading Spanish Televisions Station at **2169 Euros** per month and that by her early abrupt death her otherwise promising career was cut short and her parents and the estate have been occasioned loss and damage for which they claim damages. It is pleaded that the plaintiff suffered a lot of pain before her

death and loss of expectation of life besides the loss to the estate and the two parents as dependants. Prayers were therefore made for general damages under both Acts as well as special damage in the sum of kshs.645,897 beside costs of the suit and interest on damages and costs.

5. To the plaint the defendant filed a statement of defense in which the capacity of the plaintiff to sue in his own name is challenged, the occurrence of the accident and the particular of the motor vehicles involved was admitted but the defendant denied negligence on the part of the 1st defendant and equally the fact that the deceased was in the motor vehicle as a passenger was denied. The defendant then pleaded that the accident was occasioned and caused by the negligent by the driver of motor vehicle KBA 449Q – ZB 9813 owned by one Bajaber Hauliers Ltd, and on the material day driven by Ali Salim Ali. Particulars of negligence were then set out and the defendants proceeded to deny the particulars of dependants, particulars of special damages and the pleading that the deceased was prior to her death vibrant and by her death suffered loss of expectation of life. On the same breath and strength the defendants denied that the brother to the deceased had any cause of action against the defendants nor that he is a dependant under the Fatal Accidents Act.

6.To the statement of defense the plaintiff filed a reply to defense in which it is asserted that the plaintiff as the administrator of the estate of deceased had the legal right to file the suit on behalf of and for benefits of dependants of the deceased. That was the last pleading filed and therefore at the time of hearing the suit the pleadings had closed without any other or further pleading being filed.

Evidence tendered.

7. At trial the plaintiff called three witnesses while the defendant did not call any witness after the court was informed that the defendants had intended to call 1st defendant who had died prior to the hearing date.

8. Pw1, WYCLIFF OCHIENG OWIYE gave evidence that on the material day he had accompanied the deceased with her boyfriend one, Carlos Campon Carlos, for the visit to Mombasa. The three decided to travel to Mombasa by road and chose to use the 2nd defendants bus. He gave evidence that he personally booked three bus tickets in his name as the company insisted on identity card numbers to be inserted in the tickets. The three boarded bus No. KAX 627T destined for Mombasa. He produced the bus tickets as proof that they indeed booked and travelled in the motor vehicle. Before the Journey terminated at its desired destination, and at a place called Taita village, there was an accident involving the bus and another motor vehicle as pleaded. He blamed the bus driver for the accident for what he termed overspeeding and attempting to overtake while there was an oncoming motor vehicle. As a result of the collision the deceased died on the spot and it took the police to remove her body from the wreckage and had it transferred to Voi District hospital mortuary and later to the Lee Funeral Home in Nairobi. The witness was affirmative that he knew the parents of the deceased having met them during his visit to Spain and that the deceased was herself a journalist with a radio station and a correspondent with a daily newspaper.

9. In cross examination the witness told the court that the deceased sat some two seats behind him on the right row of seats and that having been on the isle, he was able to clearly see ahead and that the collision was not head on as the bus tried to veer off the road to the right but it was too late. He produced the official search of motor vehicle EXHP1 and two bus tickets exhibit P2.

10. Pw2, ALEJANDRO CAMPON, a Catholic Priest based at Lodwar, gave evidence that he was the holder of power of attorney donated by the father and mother of the deceased. He produced the grant of letters of administration as exhibit P4 and death certificate exhibit P5. He did not witness the accident but was called by his brother Carlos Campon Carlos about the accident and death. He travelled to Voi the same day but was only able to see the body of the deceased the next day at Voi District hospital and arranged to have it transferred to Nairobi at a cost of kshs.4,000 after paying the Voi District Hospital Kshs.200/= His evidence added that to preserve the body at LEE FUNERAL HOME kshs.616,578 was spent before it was repatriated to Spain for inerment. For that expense he produced both an invoice and receipt. The witness then produced salary payment slip to show that the deceased earned between 1014

and 2724 Euros per month. That production was never done without protest from the defendants advocate which protest was however overruled by the court. The last document to be produced was a letter extending the deceased contract of employment for an additional period of twelve (12) months.

11. On cross examination, the witness said that at the time of the deceased's death both parents were unemployed and that the deceased lived with the parents and assisted them. He further said that the disparities in the pay-slip reflected certain payments beyond salary which included holiday pay for August and summer pay for June. To the witness the average pay was **2167 Euros** per months and that to get the annual income the extra payments are taken into account.

12. The last witness to testify was Pw3, No. 81020 P.C.Julius Okech who said that he attended court pursuant to witness summons served on Voi police station Commanding him to produce file No. 1AR/F/46/08. He produced extracts of the OB which blamed the 1st defendant for the Accident and that the deceased died in that accident. He produced copies of the extract OB as EXHP14 and police abstract as EXHP3.

13. On cross examination, the witness said that the recommendations to charge the 1st defendant was discernible from the OB and that by the time EXH P3 was issued the matter was still pending under investigations. It was his evidence that he did not investigate the accident and was only called to produce the police records.

14. The production of evidence having closed at that level, parties were directed to file written submissions and to attend court to highlight same. The plaintiff filed his written submissions dated 19.11.2015 supported with decided cases and a further list of authorities dated 3.5.2016 and filed in court on 4.5.2016 while the defendants submissions are dated 11.2.2016 and filed in court on 12.2.2016.

15. I have perused and reviewed not only the evidence but also the pleadings and the submissions filed and as highlighted. Based on such review the issues that fall for consideration and determination by the court as are follows:

(a) Who was to blame for the accident of 2.9.2008 involving motor vehicle KAX 627T and KBA 449Q/ZB 9813.

(b) Is the plaintiff the administrator of the deceased's estate?

(c) Is the plaintiff entitled to damages? If so what is the quantum thereof?

(d) Who bears the costs of the suit?

(e) Is interest payable?

Analysis and determination

Capacity of the plaintiff

16. The plaintiff pleads that the plaintiff is the holder of Power Of attorney donated by the administrators of the estate of the deceased. To prove that capacity, he produced the grant of letters of administration *ad colligenda bona* issued by the judge sitting in Mombasa on the 4th July 2011 and expressed to be for:-

“the purposes only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted”

17. The plaintiff having pleaded that he sues on behalf of the administrator of the estate of the deceased, the defendants did not challenge his capacity in that regard. The defendants only contestation at paragraph 1 of the statement of defense is that the plaintiff being merely a holder of power of attorney from the parents of the deceased could not sue in his own name. To the court therefore and on the authority of

Order 2 Rule 11(4) as read with Order 2 Rule 12(3), the defendant having not joined issues with the plaintiff capacity, the plaintiff was in law not bound to lead any evidence as that fact is deemed admitted. However the fact that the plaintiff did produce the grant as exhibit 4 only bolsters his position that there were indeed the administrators of the estate and thus entitled to bring this such under the Law Reform Act.

(a) Liability between the parties

18. The pleadings filed are in agreement that indeed an accident occurred as pleaded in the plaint. What is disputed is by the defendant is the involvement of the deceased as a passenger in the defendants motor vehicle. There are therefore only two sub-issues for determination under thus heading:

- Was the deceased involved in the accident as a passenger?
- Whose negligence caused the accident?

19. Both Pw1 and Pw3 gave evidence that the deceased was in fact in the 2nd defendants motor vehicle at the time of the accident. Infant Pw1 produced a bus tickets, albeit in his name, and said that the 2nd defendant insisted on inserting identity card numbers on the tickets hence his name appearing in all. However no attempt was made at cross examination to challenge the evidence that the deceased was aboard the motor vehicle and died as a result of the accident. No question in cross examination was directed at Pw1 seeking to discredit his evidence as to the deceased's, presence and death while aboard the 2nd defendants motor vehicle. That fact when taken together with the police Records held at Voi Police station to the effect that the deceased died on the spot of the accident, and on a balance of probabilities, persuades to court that the deceased was indeed involved in the accident and met her death while travelling in the 2nd defendants motor vehicle KAX 627T as a passenger.

20. On the causation of the accident, having found that the plaintiff was a passenger, it leaves no room for conjecture that she would have contributed to her injuries in the absence of any acts of omission or commission on her part. In any event in their statement of defense there is no allegations of negligence against the deceased. Instead the defendant alleged negligence against the driver and owner of the motor vehicle Reg. No. KBA 449A/Zb 9813. It is to be noted that no attempt was made to join the said owner and driver to these proceeding hence the two remain non-parties to these proceedings with the consequence that it is not open to the court to make any findings against parties not before it. The rules of Natural Justice must be observed at all times.

21. The Plaintiff having pleaded the doctrine of RES IPSA LIQUITOR, and it being in evidence that the deceased was merely a passenger with no control over the manner the subject motor vehicle was to be controlled and was controlled, it was the duty of the defendant by virtue of evidentiary burden to prove otherwise. That duty was never discharged in the present case and on the pleadings filed could not be proved against the deceased as no pleading was filed in that regard. For the foregoing findings I hold that the 1st defendant was solely to blame for the accident sued upon for which negligence the 2nd defendant having admitted ownership of the motor vehicle and employment of the 1st, 2nd defendant, is vicariously liable. I find the two defendant whole liable and hold them jointly and severally liable.

Quantum of damages

22. This court proceeds from the position that awards by courts must be kept within limits the economy can accommodate without adverse effect. This is taken with regard and appreciation of the fact that high awards would invariable be passed back to the public by way of enhanced insurance premiums. That however is not to say that a tortfeasor merits excused from his wrongdoing.

Damage under Law Reform Act

23. Under the Act the damages are to benefit of the estate of the deceased. The first head of damages is what is referred to as lost years. To enable the court arrive at an award, the salary the deceased earned prior to death, the age at the time of death are some of the factors to be taken into account. This is what

the courts have called the multiplier approach.

24. The death certificate produced as PEXH 5 show that the deceased was aged 25 years. In this country, whose law & I am bound to apply, the retirement age is 60. Taking into account the vicissitudes of and uncertainties in life, there being no assurance that one has to live till age of retirement, and being guided and persuaded by the past decisions while noting that the sum I will arrive at the end of exercise will be an accelerated payment, I adopt a 25 years as the multiplier. Based on the authorities cited I don't agree with the defendants proposal of 7 years.

25. On the multiplicand, I note that the deceased's income showed a monthly basic salary of 856 before other benefits. However the benefits varied from month to month hence it is only reasonable that an average income for the period of 8 months would assist the court reach a just award.

26. While the plaintiff calculate the average monthly income at Euros 1 508..275, the defendant calculates the same at 1,337.44. The difference between the two is that the defendant has used earnings of 7 months instead of 8. The only reason given is that the deceased did not work for the whole month of August. That to the court would not be just. It would appear from the pay-slip for August that the employer recognised the deceased as its employee and even paid a holiday allowance. The just thing therefore is to use an average calculated from the earnings for the 8 months. For that reason the calculation by the plaintiff is more rational and reasonable. I will therefore adopt a multiplicand of 1,508.275.

27. When one multiplies the deceased's proven income over the duration she would had worked, if not for the death, one gets the loss occasioned by the death, to the deceased's estate. However in order to earn that money the deceased would have to be alive and meet daily costs and living expences. Although there was no evidence on how much of her income the deceased saved, I take notice that both parties before me take the common position that she would have saved a portion of her income. While the plaintiff proposes 2/3, the defendant purposes 1/2. Noting that I am granted a discretion to make an estimate, I adopt a ration of 2/3 so that the deceased would spend 1/3 of her income on herself and devote the rest 2/3 for her savings and assistance to the parents and younger brother she lived with.

28. The calculation for lost years therefore work out as follows:

$$1508.275(\text{Euros}) \times 15 \times 12 \times 2/3 = \mathbf{180,960 \text{ Euros}}$$

Loss of expectation of life

29. The plaintiff while putting reliance on the Court of Appeal decision in **KPA -VS- BERYLY BETHA MALOMA WERE** urged that the court to awards to the plaintiff the sum of ksh.200,000 for lost of expectation of life. The defendant on the other hand has submitted kshs.125,000 and that this award must be taken into account the court having awarded lost years. I am aware that Section 2(5) Law Reform Act, makes awards under the Act to be in addition and not in derogation from those made under Fatal Accidents Act, I award to the plaintiff the sum of Kshs.150,000 for Loss of expectation of life.

30. The deceased died instantly and on the spot of the accident: No evidence ever came from PW 1 whether the deceased survived even for a few minutes after the collusion. For instant death, the Practice is to award nominal sum and for my part I award to the plaintiff the sum of kshs.30,000. In his submissions the defendant concedes to this as reasonable and the court agrees with the parties.

Special damages

31. By the amended plaint, the plaintiff pleaded the sum of kshs.645,978, as special damages. The law enjoined the plaintiff to note only specifically plead but also strictly prove the special damages. At trial the plaintiff's side produced receipts all totaling to Kshs.621,278. It is to be noted that what was not proved is the claim for kshs.25,000 described to be for obtaining grant of letters of administration. To the court strict proof does not exclude the court from taking notice that it was necessary to obtain the grant and that if an advocate was employed, legal fees in the sum of kshs.25,000 for a succession matter would

