



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 132 OF 2014**

**WILLIAM NYAKUNDI GEKONDE .....APPELLANT**

**VERSUS**

**SUAM SUPERMARKET LTD ..... RESPONDENT**

*(Appeal from the Judgment in Kisii CM Civil Case No. 416 of 2009 (Hon. J.M. Njoroge SPM.)*

**JUDGMENT**

1. The appellant, **William Nyakundi Gekonde**, preferred this appeal following the dismissal of his suit filed in the Chief Magistrate's Court at Kisii against the respondent, **Suam Supermarket Ltd** and another, being **CMCC No. 416 of 2009**, in which a claim for damages under the Law Reform Act and the Fatal Accidents Act was made as a consequence of a road traffic accident which occurred on 7<sup>th</sup> August 2008, along the Keroka/Kijeure road involving a motor vehicle Reg No. KAL 918K Isuzu Pickup said to belong to the respondent.

2. The appellant's son, Joshua Mokaya Nyakundi (deceased) was aboard the said motor vehicle when it was hit by another motor vehicle Reg No. T405 ABA Iveco Lorry thereby causing him fatal injuries.

The appellant blamed the driver of the motor vehicle Reg No. KAL 918K (Isuzu Pickup) and the respondent for the accident. He therefore claimed damages from them jointly and/or severally.

3. The respondent denied the allegations made against itself by the appellant and in particular, the ownership of the Isuzu Pickup. It contended that if the vehicle was registered in its name, then it was sold and transferred long before the material accident which if it occurred was solely caused by the negligence of the deceased in failing to fasten the seat belt "inter alia". It (respondent) prayed for the dismissal of the suit.

4. The appellant withdrew the suit against the respondent's co-defendant and proceeded against the respondent alone. His (appellant's) case against the respondent was set out by the evidence adduced by himself (**PW 1**) and his one witness, the traffic base commander at Keroka Police Station, **C. IP Abraham Ndegwa (PW 2)**.

5. In his testimony, the appellant said that the deceased was his eldest (first born) son and that he received the news of his death on the material 7<sup>th</sup> August 2008 at 9.00 pm.

He later obtained a limited grant of letters of Administration (P.Ex 1), a death certificate (P.Ex 2) and a

letter from his chief (P.Ex 3). He also reported the accident at Keroka Police Station and obtained a police abstract (P.Ex 4). He paid for and obtained a copy of the record of the material motor vehicle (P.Ex 5 and P.Ex 6).

6. The appellant further testified that the deceased was aged 20 years at the time of his death and was unemployed although he had completed a computer course.

He (deceased) was married to one wife and they were blessed with one child. He normally undertook casual jobs and supported his family, siblings and parents but his wife later left the matrimonial home.

7. C.IP Ndegwa (PW 2) produced the necessary police abstract (P.Ex 4). His testimony was that on the material date at about 6.00 pm, the material lorry driven at the time by one Ali Twaib Rashid, developed a mechanical problem which led to brake failure thereby colliding with three (3) other vehicles including the material vehicle before overturning. The driver of the lorry died in hospital while the deceased who was in the material vehicle died on the spot.

C.IP Ndegwa, attributed the accident to the material vehicle for failure by its driver to give way to the lorry after it developed mechanical problem.

8. On its part, the respondent called its manager, **Cleophas Alenga (DW 1)**, who testified on its behalf that the material Isuzu Pickup vehicle was sold to one John Joseph Nyakundi Sagini, on the 16<sup>th</sup> September 2006. The necessary sale agreement (D.Ex 1B) indicated as much. It was accompanied by copies of transfer form and a log book. The transfer form was not fully executed and the logbook was still in the name of the respondent as the owner.

9. After hearing all the parties, the trial court rendered its judgment in which it dismissed the appellant's claim for the main reasons that the appellant's evidence was not consistent in establishing whether the deceased was a passenger in the material vehicle or a pedestrian along the road and that at the time the accident occurred the material vehicle's ownership had been passed to the co-defendant who had taken possession thereof.

10. The appellant was dissatisfied with the decision of the trial court and preferred the present appeal on the basis of the grounds contained in the memorandum of appeal dated 19<sup>th</sup> November 2014 and filed on 4<sup>th</sup> September 2015, by the appellant's advocate, **Messrs Ochoki & Co. Advocates.**

Learned counsel, **MR. Ochoki**, represented the appellant at the hearing of the appeal while **MR. Nyangwencha** holding brief for **MR. Kidiavai**, represented the respondent.

The appeal was argued by way of written submissions which were duly filed by both parties.

11. Having considered the appeal on the basis of the supporting grounds and the rival submissions, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Selle Vs. Associated Motor Boat Co. Ltd (1968)EA 123**). In that regard, the evidence led by the appellant and his witness was considered hereinabove together with that led by the respondent.

12. In its totality, the evidence brought forth the basic issue whether the accident was caused by the negligence of the respondent and if so, whether the appellant was entitled to damages and to what extent.

There was no dispute that the deceased sustained fatal injuries as a result of the accident. However, it was unclear as to whether he was a passenger in the material ill-fated vehicle or a pedestrian on the road.

13. The plaintiff indicated that the deceased was a passenger in the material Isuzu Pickup vehicle when it was hit by the material lorry thereby causing him fatal injuries. However, the evidence by C.IP Ndegwa (PW 2) through the police abstract produced by himself indicated that the deceased was a pedestrian meaning that he may have been hit by one of the three accident vehicles.

Although C.IP Ndegwa (PW 2) seemed to indicate that the deceased was inside the material Isuzu Pickup at the time of the accident, he did not reconcile that position with the fact availed in the police abstract indicating that the deceased was just but a pedestrian.

**14.** The aforementioned inconsistency raised the possibility that the deceased could have sustained fatal injuries after being hit by either the Isuzu Pickup or the lorry or the third vehicle. There was no certainty that he was hit by the Isuzu Pickup for its driver and/or its owner to be held responsible for the accident and hence his demise.

Even if the deceased was not a pedestrian but a passenger in the Isuzu Pickup, the evidence clearly indicated that the “culprit” vehicle was the lorry in as much as it developed mechanical problems and rammed into the Isuzu Pickup and the other two vehicles.

**15.** The driver and owner of the lorry were to blame for the accident in as much as they allowed a defective motor vehicle on the road. C.IP Ndegwa (PW 2), did not explain how the Isuzu Pickup contributed to the accident by failing to give way. Even if the driver of the Isuzu Pickup gave way, the lorry was already out of control due to defective brakes such that the accident could not be avoided by any of the oncoming vehicles.

**16.** And even if the driver of the Isuzu Pick up was to blame for the accident, there was no proof that he was an agent/servant/employee of the respondent for the respondent to be held vicariously liable for his negligent acts and/or omissions.

Besides, at the material time of the accident, the material vehicle (i.e Isuzu Pickup) was in the possession of a third party having been sold to him by the respondent even though the formal transfer had not been completed. If anything, the third party or the driver/owner of the lorry or both ought to have been the correct defendants in the suit.

**17.** For all the foregoing reasons, this court would hold that the respondent was not in any manner responsible for the material accident.

The respondent was not directly or indirectly in control of the material Isuzu Pickup vehicle for it to be held negligent by its actions and/or omissions. It could not therefore be held liable to the appellant in damages. The appellant’s case against itself was rightly and properly dismissed by the trial court.

**18.** However, the trial court was in error when it failed to assess the damages it would have awarded had the appellant’s case succeeded. The dismissal of the appellant’s case notwithstanding, the trial court was under duty to assess the damages payable to the appellant. Authorities on this point by the Court of Appeal are widespread. Some of which are herein cited in the written submissions by the appellant.

**19.** If this appeal had succeeded, the appellant would have been entitled to damages under both the Law Reform Act and the Fatal Accidents Act.

Under the Law Reform Act, this court is of the view that a sum of Ksh. 20,000/= for pain and suffering and a sum of Ksh. 100,000/= for loss of life expectation would suffice as adequate and reasonable compensation.

Under the Fatal Accidents Act, this court would not have applied the multiplier approach in assessing damages as there was no evidence to establish a multiplicand in terms of the deceased’s monthly earnings (if any).

**20.** There was no evidence from the appellant establishing the monthly earnings or any earnings of the deceased. Nonetheless, he expected to benefit from the earnings of the deceased if he was to be employed given that he had just completed his course in a computer college. In such circumstances, the global approach would be ideal in assessing loss of dependency. In that regard, this court would award a global figure of Ksh. 500,000/= under the head.

The appellant would also be entitled to proven special damages.

Otherwise, this appeal is devoid of merit and is hereby dismissed with costs to the respondent.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**[Delivered and signed this 25<sup>th</sup> day of May 2016].**