



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 186 OF 2011

STELLA NASIMIYU WANGILA

ELIZABETH CHEBOR CHELANGAT

(LEGAL ADMINISTRATORS OF THE ESTATE OF LATE RICHARD

TANUI CHELAGAT (DECEASED).....PLAINTIFFS

VERSUS

RAPHAEL ODURO WANYAMAH.....DEFENDANT

JUDGMENT

1. On the 10th June 2010 the deceased Richard Tanui Chelagat, a High School teacher and a pedestrian was fatally injured in an accident involving three motor vehicles, Registration Numbers KAK 688T the property of the Defendant Raphael Oduro Wanyamah who was also its driver motor vehicle **Registration No. KAS 630P and KAY 651A**. The plaintiff's being the administrators of the deceased estate filed suit against the defendant and blamed the defendant for negligence and sought loss and damage under the Law Reform Act and the Fatal Accidents Act.

2. The defendant denied having been negligent and in turn blamed the drivers of the other two vehicles and the deceased. The owners and drivers of the other two vehicles were not parties to the plaintiff's suit.

3. The plaintiffs case was heard by Justice H. Omondi and the defence was taken before me. The issues for determination are therefore on liability as to which party was to blame for the accident and *quantum* of damages.

4. Liability

The plaintiffs case was urged by three witnesses.

PW1, Stella Nasimiyu Wangila, one of the Administrators of the deceased estate described herself as the widow of the deceased with whom they had four children aged 14, 12, 9 and 8 years old. She produced as exhibits the Grant of Letters of Administration *Ad Litem*, Police Abstract, and the Death certificate of the deceased then 38 years old. She also produced his payslips for the relevant period and receipts in support of the claim for special damages.

She was not an eye witness to the accident.

5. **PW2, Lawrence Sosiondet Baraza** was together with the deceased when the accident occurred. He testified that he had visited the deceased at his home and had escorted him to the *matatu* stage at Shell petrol station along Nakuru-Eldoret road when he saw three vehicles all being driven towards Eldoret direction. It was his testimony that while at the stage, there was a Nissan on the inner lane, behind it was a Saloon Car Registration Number KAK 688T and beside the Nissan was a motor vehicle KAY 651A when suddenly Motor vehicle KAK 688T swerved from the right lane to the left and then went back to the right lane and in the process this vehicle hit the Nissan Registration number KAS 630P, it lost control, went off the road to the left side and drove off the road onto the pedestrian walkway where it hit him then it knocked the deceased, pushed him down then ran over him, then stopped near some road side kiosks. They were both taken to Nakuru Provincial hospital by good Samaritans where the deceased died the following day. He blamed the defendant for driving too fast in the circumstances as he could not control the vehicle, swerving off the road and knocking the deceased and himself five feet off the pedestrian side walk, from which injuries the deceased died.

6. On cross-examination, he reiterated his testimony and was not shaken. He stated that when he saw the vehicle coming towards them, they moved away but could not run as they could not tell which direction it would come as it had lost control. He reiterated that motor vehicle Registration No. KAK 688T is the one that knocked them, and not motor vehicle Registration No. KAY 651A, the Pick-up, which did not stop.

7. **PW3 PC Christopher Kiarie** a police officer from Nakuru Traffic Base brought to court the police file in respect of the accident. He was not the investigating officer. He produced the police Abstract and confirmed occurrence of the accident involving the three vehicles, and the deceased.

From the police investigation report, he stated that motor vehicle registration No. KAK 688T lost control, hit vehicle KAS 630P and KAY 651A then proceeded to knock down the two pedestrians, the deceased and Lawrence Sossindet (PW2) who were on the roadside bus stage. He stated that the case had not been concluded and there was no indication as to who would be charged with a traffic offence.

8. Defence Case

The defendant testified that he was the driver and owner of motor vehicle registration No. KAK 688T. He adopted his statement he recorded on the 4th September 2012 and filed on same date. It was his evidence that while overtaking Nissan *matatu* Reg. No. KAS 630P that was in front of a pick-up, Registration No. KAY 651A, suddenly the pick up registration No. KAY 651A came to his lane without any warning, he applied brakes but it was too close so he hit it and lost control, and the vehicle veered off the left side of the road and stopped off the road near road side kiosks. He stated that his vehicle did not overturn and that he did not hit anybody as when he stopped there was nobody, except some business persons who came, then a breakdown came and towed the vehicle to the police station. He stated that he did not see any pedestrians nor did he hit any pedestrian and that the Nissan pick-up and the *matatu* did not stop.

9. Upon cross examination, he denied having caused the accident but admitted hitting the pick-up on the driver's side and left rear part- with the left front of his vehicle, then swerved to the left and went off the road but denied seeing or hitting any pedestrian. He admitted that he was over speeding at 60 KPH which was beyond the speed limit for the area, set at 50KPH. He reported the accident at the police station in the same evening. On re-examination, he stated that motor vehicle registration Number KAY 651A – pick-up is the one that hit the pedestrian (deceased) and not his vehicle. He blamed the pick-up vehicle Registration KAY 651A for the accident.

10. **Evaluation of Evidence and submissions**

There is no dispute that an accident involving the three vehicles took place at the date and place as pleaded in the respective parties pleadings.

The plaintiffs evidence as tendered by PW2 tallies substantively with the defendants evidence, as recorded in his statement and tendered in court which was further corroborated by the Police Officer PW3 – who produced the police file in respect of the accident which agreed with the sequence of events leading to the occurrence of the accident.

There is no dispute too that in that multiple accident, the deceased was knocked down by one of the vehicles and sustained fatal injuries.

11. Evidence adduced by both plaintiffs witnesses and the defendant agree that the defendants motor vehicle Registration No. KAK. 688T hit the pick-up Number KAY 651A, that it lost control and drove off the road, onto the pedestrian walk way, near some kiosks where there were many people.

The defendant however denies hitting anybody and stated that the other two vehicles, the pick up and the *matatu* did not stop, and at the same time stated that it was the pick-up **No. KAY 651A** that knocked down the deceased. He blamed the pick up for the accident. He did not blame the deceased or at all.

12. The plaintiffs submissions

are that the defendant by his own admission was over speeding and as a result could not control his vehicle when he hit the pick-up, drove off the road where his vehicle stopped after knocking down and pushing/dragging the deceased.

It is submitted that his evidence was contradictory, that it is his vehicle KAK 688T that triggered the series of collisions as he tried to overtake eventually knocking down the deceased and PW2. It is submitted that it is the defendants vehicle that hit the deceased and not any of the other two. That no evidence was tendered that any of the other two vehicles hit the deceased. It is on record the Defendant saying that the pick-up and *matatu* did not stop.

13. **Defendants submissions** on the other hand are that the plaintiffs failed to prove negligence on a balance of probability against the defendant. It is submitted that the plaintiffs failed to link causation of the accident to the defendant, that the fact that an accident occurs does not follow that a particular person had driven dangerously without due care and attention. It is submitted that motor vehicle registration No. KAY 651A, by its sudden moving onto the path of the defendants vehicle, was the one to blame, and that the sequence of events before and during the collisions by the defendant is what any reasonable person would have acted and done in the circumstances.

14. The plaintiff sought leave to amend the plaint Paragraph 3, that read:

“motor vehicle registration No. 688T that he permitted the same to loose control and get involved in an accident with motor vehicle registration Number KAS 630P and KAY651A which in turn hit the deceased as consequence.”

It is submitted that parties are bound by their pleadings and that by the underlined sentence, it is means that motor vehicle KAY 651A is the one that hit the deceased and not the defendants motor vehicle.

15. To come to an informed decision, I have carefully combed through the evidence as tendered as well as submissions by both counsel.

Evidence abound that the deceased was hit by one of the three vehicles while off the left side of the Nakuru-Eldoret road at the shell petrol station bus stage. The defendant's vehicle is the only one that lost control and drove off the road at the left side onto the pedestrian walkway where it stopped. The defendant in his own testimony admitted that his vehicle lost control and veered off the left side of the road where it stopped and that that the other two vehicles did not stop. In the same breath he stated that the deceased was hit by the pick-up registration No. KAY 651A. It is curious how the defendant could come to such conclusion when he did not testify to even seeing the pick-up hit the deceased who was off the road. It was never suggested that the pick-up lost control and drove outside the road and onto the

pedestrian walk path or the bus stage. I agree with the plaintiffs submissions that the defendants evidence is contradictory, and does not add upto the admitted facts by the defendant in his evidence.

16. I also agree that a nexus must be established between the wrong doer and the victim who suffers damage and seeks compensation from the wrongdoer. A duty of care too must be established.

See **Anns -vs- Merton London Borough Council (1978) AC 728.**

17. The sequence of events leading to the accident, as far as the evidence is concerned are not contraverted. The defendant has not contraverted the plaintiffs PW2 evidence who was an eye witness as well as a victim of the same accident. No iota of negligence has been attributed to the deceased. The defendant blamed the pick-up, and never the deceased.

18. The owner and driver of the said pick-up Registration No. KAY 651A are not parties in this case. The defendant had an option and opportunity to enjoin that party to the suit – See **Order 1 Rules 15 of the Civil Procedure Rules.** He did not do so. A court cannot adjudicate on issues touching a party or pass judgment against a party who is not a party in a suit. Failure to join the party that the defendant blames for the accident as a third party or a necessary party and or seek indemnity from that party has a legal consequences as held in the case **Jemimah Wambui Njoroge -vs- Philip Mwangi (2001) e KLR.** The defendant has only himself to blame. He admitted losing control of his vehicle, driving off the road and stopping near kiosk where there were people, yet at the same time saying that he did not knock down anybody. Contrary evidence was adduced by PW2. I am persuaded to believe this witness(PW2) as truthful.

19. I have considered the plaint. Amongst particulars of negligence attributed to the defendant are:

“driving at a manifestly excessive speed in the circumstances, driving without due care and attention, failing to control motor vehicle registration Number KAK688T so as to avoid the accident---”

I hold that there is no better prove of negligence than an admission by the defendant in his evidence that he indeed lost control of his vehicle veered off the road and stopped near some kiosk. In **Muthuku -vs- Kenya Cargo Services Ltd e KLR as cited in Tombe Tea Factory Ltd -vs- Samuel O. Oraka (2010) e KLR.**

20. Coming back to the issue of proposed amendment to Paragraph 3 line 5 of the Plaint. I have been urged by the defendant to construe the sentence underlined on Paragraph 15 above to mean that the deceased was hit by motor vehicle Registration No. KAY 651A. The plaintiff submits that motor vehicle Registration no. KAK 688T triggered the series of collisions, and that use of the word “**and**” in place of “**which**” does not exonerate the defendant from blame.

I agree that parties are bound by their pleadings. In my opinion, one word in a pleading cannot be taken in isolation. The whole text and context must be considered together to bring out the intention of the drafter, and to come to a meaningful interpretation of the text as a whole.

I am guided by the case **Joseph Mbuta Nziu -vs- Kenya Orient Insurance Co. Ltd (2015) e KLR** where it is stated:

“--it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The paragraph subject of discussion which ever way it is read,has the same effect as if the amendment sought to substitute the word “**and**” with “**which.**” **Article 159(2) (d) of the Constitution** enjoins the courts to dispense justice without undue procedural technicalities that do not go into the merit of a case. I

find that the pleading as stated has the effect it was intended to.

21. In the case **Nadwa -vs- Kenya Kazi Ltd (1988) e KLR**, the Court of Appeal observed:

“In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendants evidence provides some answer adequate to displace that interference.”

That in my considered opinion is the summary of the plaintiff's case as far as liability is concerned. I find the defendant wholly to blame for the accident and consequentially liable in damages.

22. Quantum of damages

(a) Pain and suffering:

Under the **Law Reform Act** the plaintiffs submit that the deceased died one day after the accident. The plaintiff proposes a sum of Kshs.1,500,000/= citing recent case of **David Nganga -vs- Nairobi City Council Nairobi HCCC No. 361/2001** where a sum of Kshs.1,500,000/= was awarded in May 2013.

The defendant proposes a sum of Kshs.15,000/=. I have taken into account inflation and time lapse since the above awards were given.

I shall award a sum of Kshs.500,000/= under this sub-head as more realistic and reasonable sum. See **David Kajogi M'Mugaa -vs- Francis Muthomi (2012) e KLR**.

(b) Loss of expectation of life

The plaintiff proposes a sum of Kshs.350,000/= while the defendant puts forth Kshs.60,000/= as fair. I am alive to the fact that the deceased died at a prime age of 38. In **HCCC No 48 of 2003 – Rosemary Epurukel -vs- P.C. Absalom Kariuki**, Justice Sitati awarded Kshs.150,000/= to the plaintiffs for deceased who was 38 years. The same amount was also awarded in **HCCC 523 of 2001 John Jembe Mumba -vs- Self Mbaruku & Other** for a deceased also aged 38 at date of death. Inflation and time lapse have been considered.

I shall award a sum of Kshs.500,000/= damages for loss of expectation of life.

23. Loss of Dependency Under the Fatal Accidents Act.

Damages under the fatal Accidents Act are awarded for the benefit of the deceased's dependents. Section 4(1) of the Act defines Dependents as:

“---wife, husband, parent and child of the person whose death was caused---”

Dependency is a matter of fact and has to be proved. The plaintiffs in this case described themselves as the Legal Administrators of the estate of the deceased. I have seen the *Ad Litem* grant issued to them.

An administrator or legal representative of a deceased's estate need not be the deceased's dependants, the wife, husband, parents or the children of the deceased. Anybody having an interest in the deceased's estate may petition for grant of such Letters of Administration. It is therefore incumbent upon the plaintiffs to adduce sufficient evidence to prove their dependency as provided under **Section 4(1) of the Fatal Accidents Act**.

24. **Stella Nasimiyu(PW1)** one of the plaintiffs and co-administrator of the Estate described herself as the

deceased's widow with whom they had sired three children.

She did not prove any form of marriage under any recognized regime by marriage certificate in a statutory marriage, or evidence of a customary marriage or any other form of marriage recognised in law, not even a letter from the local administration to prove her marriage to the deceased.

Likewise, she did not produce Birth certificates for the four children, their baptismal cards, school records or any form of documents to satisfy the court that they were indeed children of the deceased, and therefore dependants as provided under **Section 4(1)** above.

25. The court can not be called upon to make assumptions on material facts that ordinarily would be easy to prove. The court finds that no dependency was established by the plaintiffs.

See **Joseph Wachira Maina -vs- Mohamed Hassan (20060 e KLR** -where the Court of Appeal stated that dependency is a matter of fact that must be established by evidence, and this the plaintiffs failed to do.

In their submissions by counsel, the plaintiff stated that the deceased had lived with the plaintiff, PW1, for some time and had four issues, and proceeded to tabulate their ages ranging from 14 to 7 years.

I have considered the plaint as well as PW1's evidence. She did not mention that she lived with the deceased, but only that she was a wife and had any children with him, and that he was the one who was supporting them. Having failed to satisfactorily prove that she was a wife and the children were children of the deceased, I am constrained to hold and find that no dependency was established or at all. I award NIL damages under this subhead.

26. If dependency was established, the following is what I would have awarded. It is not in dispute that the deceased was a High School teacher earning Kshs.46,227/= Gross salary as evidenced by the payslips tendered for the material period. It is the net salary that ought to be considered for purposes of calculating dependency, My opinion and that of many courts is that NET salary is Basic salary plus allowances less statutory deductions. The statutory deductions should not include loans, and contributions to various organisations.

In this respect, the deceased's net income is Kshs 38,107/= after deducting Kshs.320/= NHIF and PAYE Kshs.7,800/=, thus a sum of Kshs.8,120/= leaving Kshs.38,107/= as the NET income.

27. The deceased was 38 years old. He would have worked upto the age of 60 save for vicissitudes of life. The plaintiff proposed a multiplier of 22 years, being the balance of his working life to 60 years while the defendant proposed Kshs.31,070/= being the Basic Salary plus allowances less statutory deductions and all others shown in the payslips being union dues, bank Loans, among others.

I do not agree with the defendant on this and as I have stated above, and supported by numerous decisions, the only amounts to be deducted from the Basic salary plus allowances are statutory deductions. The same position was held in the case **Stella Kanini Jackson & Another-vs- Kenya Power & Lighting Co. Ltd (2012) e KLR, Josephine Njeri Tarrino -vs- Narok County Council & Others and Njuguna & Another -vs- Swan Carriers Ltd (2004) e KLR** among others.

To that end, I find that the net income of the deceased was Kshs.38,107/=.

The deceased would have probably worked upto age 60 – barring unforeseeable events in life. He had a balance of 22 years. However, due to the contingencies of life, **I shall allow 15 years as the multiplier.** In **Njuguna & Another -vs- Swan Carriers (Supra)**, the court allowed a multiplier of 15 years for a 36 year old.

The choice of a multiplier is a matter of the court's discretion which must be exercised with reason. The nature of work that the deceased was engaged in ought to be considered as some work attach too many

risks making long working life hard. Not far a teaching career which poses very minimal risks, if any.

I find a multiplier of 15 years to be fair and reasonable.

See Board of Governors of **Kangubiri Girls High School and Another -vs- Jane Wanjiku & Another** C.A No. of 2014, (2014) e KLR.

28. I now turn to the **Dependency Ratio**. The defendant proposed a $\frac{1}{2}$ ratio while the plaintiffs proposed $\frac{2}{3}$. As observed above, the sum out of the deceased's income that would have been available to the deceased's Dependents, leaving a $\frac{1}{3}$ or $\frac{1}{2}$ ratio to himself, for his personal use.

I have held that no proof of dependency was demonstrated. The result is that the deceased is held to have been using a substantive amount out of his income on himself and for his personal use. Taking all the circumstances together, I shall allow a dependency ratio of $\frac{1}{2}$.

In calculating loss of dependency (Lost years) under the Fatal Accidents Act, I have adopted the following, in summary:

- **Income** - **Kshs.38,107/=**
- **Multiplier** - **15 year**
- **Multiplicand** - **$\frac{1}{2}$**

Thus 38,107/= X 15 X 12 X $\frac{1}{2}$ = Kshs.3,429,630/=

Had dependency been proved, that is the amount I would have awarded.

29. The plaintiff's stated a special damage of Kshs.50,000/= being funeral expenses of Kshs.30,020/= and Kshs.20,000/= legal fees for obtaining Letters of Administration. Receipts in support of the same were produced. The claim having been pleaded and proved it is allowed.

30. In **Kemfro -vs- A.M. Lubia & Another (1982-88) I KAR 727**, the court held that if the net benefit from both the Law Reform Act and the Fatal Accidents Act is for the benefit by the same dependants, it ought to be discounted to avoid double benefit that the law does not allow. However, **Section 1(5) of the Law Reform (Miscellaneous provisions) 1934** confers all rights under the Act for the benefit of the estate of deceased's persons in addition to, and not in derogation of any rights conferred on the dependants of the deceased by the **Fatal Accident Act**.

In the present case, it is evident that the awardable benefits under the two acts are not for the benefit of the same beneficiaries the court having found that the plaintiffs failed to prove dependency.

In conclusion, I enter judgment for the plaintiffs against the Defendant as follows:

- 1. Liability 100% against the defendant**
- 2. Damages under the Law Reform Act Kshs.1,000,000/=**
- 3. Loss of Dependency Kshs.3,429,630/= but dependency not proved, therefore NIL.**
- 4. Special damages – Kshs.50,000/=**
- 5. Costs of the suit to the plaintiffs.**

Dated, signed and delivered in open court this 22nd day of September 2016

JANET MULWA

JUDGE