



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**HCC NO. 169 OF 2012**

**DAVID SAKARI WASIKE.....PLAINTIFF**

**VERSUS**

**MAKU ROBA BARISI .....DEFENDANT**

**JUDGEMENT**

DAVID SAKARI WASIKE has filed this suit as the legal representative of the estate of the late JENTRIX NAKHUMICHA SIMIYU, against MAKO ROBA BARISI (1<sup>st</sup> defendant) and IBRAHIM ABDI (2<sup>nd</sup> defendant) seeking damages arising from a Road Traffic Accident involving collisions of motor vehicle no. KBK 731 D/ZC 6354, belonging to the 1<sup>st</sup> defendant. The deceased Jentrix, died instantly as a result of injuries sustained in the accident.

The evidence is that Jentrix was traveling from Mombasa to Bungoma in a bus named Crown Bus registration number KBK 731D. According to a passenger James Nganga Ndirangu (PW2), when he got at Salgaa, The bus was driving on an ascending part of the road, which had three lanes at about 2.00 a.m. This was on the extreme left side of the road as one faces Eldoret direction, when a trailer emerged from the opposite direction, descending while moving in a zigzag manner, and onto his lane. The trailer hit the bus, which crashed into the bush. He was able to see all the happenings because he was on the third seat from the driver and he could see the road ahead clearly, with the aid of the bus headlights. Both motor vehicles crashed onto the left side of the road.

On cross-examination he denied any suggestions that he had fallen asleep saying passengers had just alighted at Nakuru for refreshments and he was still awake. He also clarified that there were no other motor vehicles in the middle lane nor was the trailer or the bus attempting to overtake any motor vehicle saying:-

"Infact our driver tried to avoid it, which is why it hit the side of our bus".

PW3 CPL EVERLINE MURUNGA of Salgaa Traffic Base confirmed occurrence of the accident in which ten passengers died. She also confirmed that the road has,three lanes and that the bus was on its left side of the lane as one faces Eldoret direction. She referred to the statement by the trailers driver who said that the trailer's brakes failed so he was not able to control it resulting in the accident. She stated that the bus was ascending while the trailer was descending. The defendant's driver was charged for causing death by dangerous driving in Molo court and a copy of the police abstract has been produced as exhibit 8 and the police file as exhibit 10.

According to the plaintiff, the deceased who was, his cousin was aged 26 years old and was working at Aga khan hospital Mombasa as a Kenya Registered Community Nurse at a salary of kshs. 31,500 and a

net pay of kshs. 27,079 as per her payslip for January, 2011 (exhibit 7) her basic pay was kshs. 25,700. At that time of the accident, Jentrix had worked for only one year, and was single, her dependants being her mother and brother.

The defence offered no evidence. The plaintiff's counsel submitted that the evidence clearly demonstrated negligence on the part of the trailer driver and judgment ought to be entered in favour of the plaintiff against the defendants on liability at 100%.

The defence counsel on the other hand argues that the evidence produced is not clear exactly how the accident occurred and the court ought to find that the plaintiff's evidence was too weak to support the claim.

The evidence has clearly demonstrated that it was the trailer driver who was negligent, and in fact was charged with the offence of causing death by dangerous driving which is not denied and no evidence was led to controvert the evidence presented by the plaintiff's witness which clearly states that the accident was as a result of negligence.

I am guided by the case of **CHAO VS DHANJAL BROTHERS & 4 OTHERS (1990 KLR 483)** where Githingi, J (as he then was) stated:-

"Where the circumstances of the accident give rise to the inference of negligence, then the defendant in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence that the account was consistent only with an absence of negligence".

As noted, the defence merely denied liability with no award to offer whereas plaintiff's evidence showed it was the defendant's motor vehicle which departed its lane and went into the path of the bus and hit it. I therefore find and hold that the defendant's driver was negligent and judgment is entered against the defendants on liability at 100% under Law Reform Act. For pain and suffering, the plaintiff's counsel suggests general damages kshs. 20,000 whilst defence offers kshs. 5,000.

I have considered the past decisions and current economic trends so for pain and suffering and in my view as since the deceased died on the spot, general damages in the sum of kshs. 20,000 is reasonable and I so award.

**Loss of life expectation:** The plaintiff's counsel suggest a sum of kshs. 100,000 while the defence counsel offers kshs.70,000. I have considered past decision and I am guided by the decision in case of **BETTY & NGATIA VS SAMUEL KINUTHIA THUITA HCC C NO. 339 OF 1998 (NKU)** & where a sum of kshs. 100,000 was awarded for loss of life expectation where the deceased was 22 years old. I think the figure suggested by plaintiff's counsel of kshs. 150,000 is reasonable and I so award paying regard to current economic trends and rate of inflation.

### **Fatal Accidents Act**

**Loss of dependency:** The plaintiff's counsel submits that prior to her death, the deceased was in good health working as a registered nurse with a net salary of kshs. 27,079 per month, which was supported by the payslip produced. The plaintiff testified that the deceased was the family's sole bread winner and she used to send her 70 year old mother a monthly upkeep of kshs. 20,000. Counsel suggested a multiplier of 30 years. The defence counsel urged this court to be guided by section 4(1) of the Fatal Accidents Act which provides that;

"Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and children of the person whose death was caused and in every such action, the court may award such damages as it may think proportioned to the injury resulting from death of the persons respectively for whom and per whose benefit the action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst

these persons in such shares as the court by its judgement, shall find and direct".

The defence counsel argues that the deceased's cousin (i.e plaintiff) and brother do not qualify as beneficiaries or dependants under the Fatal Accidents Act. He,thus urges this court not to make any award under this head.

I have considered both sentiments, the plaintiff confirmed to this court that plaintiff's mother is alive, aged 70 years and was receiving support from her. He had amended the pleadings to show that the mother and brother were beneficiaries of the deceased contained in copy of plaint dated 3<sup>rd</sup> March, 2014. I find that although they are named as beneficiaries who depended on the deceased for upkeep, the claim under this head is subject to proof of the dependency level. It is not clear where the plaintiff got the information that the deceased was giving upto  $\frac{3}{4}$  of her salary to her mother and her brother. It was also not indicated whether the brother was in school, married, working, elder or younger.

Indeed in the case of **GERALD MBALE MWEA VS KARIKO KIHARA & ANOTHER (1997) KLR (Civil Appeal NO. 112 of 1995)**, the court stated;

" The issue of dependency is always a question of fact, to be proved by he who asserts it". Why for instance didn't Jentrix's mother come to testify to confirm the level of support she was getting from her. If her brother Grahamm was supposed to join college at the time of her death what difficulty did the plaintiff have in (a) getting Graham to come and testify in court, (b) Producing the college admission forms.

It seems to me that the real reason behind this claim is that the plaintiff wants to recover money he spent on deceased's education - This is borne out by his own statement that

I am the one who used to pay Jentrix college fees".

I therefore hold and find that the claim for loss of dependency has not been proved.

I therefore enter judgment in favour of the plaintiff against the defendant on liability at 100% as follows under Law Reform Act.

- a) Pain and Suffering kshs.20,000 (Twenty Thousand only).
- b) Loss of expectation kshs. 150,000

Under Law Reform Act, the loss of dependency is not proved and nothing is awarded.

- (c) Special damages kshs. 25,000
- (d) Costs of the suit to the plaintiff.

**Written and dated this ..... day of.....2014 at Bungoma**

**H.A OMONDI, J**

**Delivered and dated this 21<sup>st</sup> day of January 2015 at Nakuru**

**JANET MULWA**

.....

**JUDGE**

In the presence of

..... for plaintiff

.....for defendant

.....Court clerk.