



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 11 OF 2010

MARGARET MBITHE

MUNYWOKIPLAINTIFFS

CHARLES KYALO MUNYWOKI) (SUING AS PERSONAL REPRESENTATIVES OF ESTATE OF..

PETER KISUMBA THYAKA

(DECEASED).....PLAINTIFFS

VERSUS

**ONESMUS KIBOGI.....1ST
DEFENDANT**

**JOSEPH MWANGI KARIUKI.....2ND
DEFENDANT**

J U D G M E N T

1. **Margaret Mbithe Munywoki** and **Charles Kyalo Munywoki** who described themselves as Legal Representatives of the Estate of **Peter Kisumba** sued the Defendants claiming special and general damages under the **Law Reform Act** and **Fatal Accidents Act**.
2. It was pleaded that on or about **11th February, 2009**, the deceased was travelling aboard motor-vehicle registration number **KAZ 621X Toyota Matatu** (Subject motor-vehicle) as a fare paying passenger. The subject motor-vehicle was being driven by the 2nd Defendant as an agent/servant of the 1st Defendant the registered owner of the motor-vehicle. He negligently drove, managed and/or controlled the motor-vehicle which resulted into a road accident where the deceased suffered fatal injuries hence the claim.
3. The Defendant denied ownership of the motor-vehicle. They denied the occurrence of the accident. In the alternative it was averred that the accident was caused solely and/or substantially contributed to by the negligence of the deceased.
4. At the hearing he called four (4) witnesses. PW1, **No. 73406 P C Francis Kisavi** stated that the accident in issue was self-involved. He produced in evidence a police abstract form filled in respect of the accident. On cross examination he stated that the cause of the accident was a tyre bust.
5. PW2 **Margaret Mbithe Munyoki** a wife to the deceased got the information and went to the hospital where the deceased was undergoing treatment. He was pronounced dead thereafter.
6. PW3 **Dr. Fredrick Chege Mbutha** produced in evidence a postmortem report made following the autopsy carried out.
7. PW4 **Jimmy Matheka Mulwa** who was a passenger aboard the ill-fated matatu stated that the

- deceased had fastened his seat belt and the cause of the tyre burst was over speeding.
8. The defence case was closed following non-attendance on their part.
 9. Submissions filed by the Plaintiffs have been duly considered.

10. LIABILITY

Evidence of ownership of the motor-vehicle registration number **KAZ 621X Toyota Matatu** was adduced by the Plaintiffs who produced a copy of records from the Registrar of Motor-vehicles. As at the **13th** day of **July, 2009** the registered owner of the motor-vehicle registration number **KAZ 621X** was **Kibogo Onesmus**, the 1st Defendant herein. An abstract from the police on the stated accident showed that the 1st Defendant was the beneficial owner of the motor-vehicle.

11. It was pleaded and not denied that the 2nd Defendant was the person in control of the motor-vehicle at the time of the accident. A list of documents was filed by the Defendants which included a statement from **Joseph Mwangi**, the 2nd Defendant who identified himself as the person who was driving the motor-vehicle when it rolled.
12. Negligence on the part of the Plaintiffs as particularized was that: The 2nd Defendant was driving the motor-vehicle at an excessive speed in the circumstances; he drove the motor-vehicle without regard to the safety of the passengers and he failed to brake, swerve, stop, slow down or in any other way so manage and/or control the motor-vehicle.

On cross examination, PW1 stated that the cause of the accident was a tyre burst. When it happened the driver of the motor vehicle lost control and was not competent enough to control it.

13. PW4 who was a passenger aboard the motor vehicle stated that the motor-vehicle was over speeding hence the accident following a tyre burst. A motor-vehicle rolling two – three times following a tyre burst was evidence of over speeding. This was proof on a balance of probabilities that the 2nd Defendant drove the motor-vehicle without any duty of care to the passengers that were on board, the deceased inclusive, which was negligent on his part. The tortious act was committed while the 2nd Defendant was in the course of employment as a driver of the motor-vehicle, therefore the 1st Defendant, the registered and beneficial owner was vicariously liable (**See Kaburu Okelo & Partners v. Stella Karimi Kabia & 2 Others (2012) eKLR**). In the premises the Defendants are severally and jointly liable for the accident at **100%**.

14. QUANTUM

The Plaintiffs adduced in evidence a grant of letters of administration ad litem issued on the **3rd July, 2009** that enabled them to institute the suit hence their capacity to sue is not in dispute. According to the information on the abstract from the police, the accident occurred on the **11th February, 2009** at **9.00 a.m.** PW2 reached the hospital at about 11.00 a.m. while the deceased was undergoing treatment. He passed on at about 12.00 midday. The death in issue having not been instantaneous, definitely the deceased suffered pain prior to passing on. In the circumstances, I award a sum of **Kshs. 60,000/=** on this head.

15. LOSS OF EXPECTATION OF LIFE

A death certificate adduced in evidence proved the age of the deceased. At the age of **40 years** he was expected to live for many more years had it not been for the wrongful act that resulted into his death. A conventional figure that is awarded by courts on this particular head is **100,000/=** (**See Loise Wairimu Mwangi & Another v. Joseph Wambua Kamau (2006)eKLR**). In the circumstances, I award **Kshs. 100,000/=**.

16. LOSS OF DEPENDENCY

The deceased was **40 years** old and married to PW2. They had **three (3) children**:

Nelson Mandela Kisumbi;

Kennedy Kaunda Kisumba; and

Mike Kyalo Kisumba.

He was employed by the **Electoral Commission of Kenya (ECK)** as a cartographer earning a gross salary of **Kshs. 115,905/=**. He had committed most of the money such that he earned a net salary of **Kshs. 37,702.75**. Had his life not been shortened by the accident he would have worked comfortably up to the age of **50 years**. Probably he would have opted to retire at an early age of **50 years**. Therefore I will adopt a multiplier of **10 years**. Taking into consideration taxation and other expenses he may have incurred I will adopt a multiplicand of **Kshs. 60,000/=** and a dependency ratio of 2/3. The multiplication will be as hereunder:

$$60,000 \times 10 \times 12 \times 2/3 = 4,800,000$$

17.SPECIAL DAMAGES

The claim was for **Kshs. 170,300/=**. What was specifically proved was **Kshs. 123,200=** which I award.

18. Therefore, I enter judgment for the plaintiffs as against the Defendants jointly and severally as follows:

- ***Pain and suffering*** ***Kshs. 60,000/=***
- ***Loss of expectation of life*** ***Kshs. 100,000/=***
- ***Loss of dependency*** ***Kshs. 4, 800,000/=***
- ***Special damages*** ***Kshs. 123,200/=***

Total ***Kshs. 5,083,200/=***

Plus costs and interest.

19. It is so ordered.

Dated at Kitui this 8th day of December, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 16th day of December, 2015.

P. NYAMWEYA

JUDGE