



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL “R” 2 OF 2003.

EWOI EKWOR ASIKE:::PLAINTIFF.

VERSUS

THE BOARD OF GOVERNORS)

ST. JOSEPHS BOYS SECONDARY) ::::::::::::::::::::::::::::::: DEFENDANT.

SCHOOL

(KITALE))

J U D G M E N T.

The plaintiff, **Ewoi Ekwor Asike**, filed this suit as the legal representative of the estate of the late Paul Woi Loliti (deceased) who passed away on the 9th March, 2001, after being hit by a vehicle Reg. No. KUF 551 Isuzu lorry belonging to the defendant, **Board of Governor, St. Joseph's Boys' Secondary School, Kitale**, which was at the material time being driven along the Kipsongo/Kitale road near Marshall Garage when it veered off the road and hit the deceased who was lawfully pushing a handcart and who suffered fatal injuries.

The plaintiff contended that the accident was caused by the negligence of the driver of the vehicle and therefore filed this suit claiming damages against the defendant under the Law Reform Act and the Fatal Accidents Act.

The plaintiff is also claiming special damages in terms of the expenses suffered as a result of the accident.

The defendant filed a statement of defence in which they deny the allegations by the plaintiff that he is the personal representative of the deceased and also the allegations of negligence made against them by the plaintiff. They contend that the accident was solely caused and/or substantially contributed to by the negligence and recklessness of the deceased. They also deny that the plaintiff suffered any loss and damage entitling him to general and special damages.

The defendants prayed for the dismissal of this case with costs.

At the hearing of the case, the plaintiff, Ewoi Asike (PW1), stated that he was not present when the accident occurred. He received information about the accident and reported to the police. He later obtained the necessary death certificate, a police abstract and a grant of letters of administration and instituted the present suit thereafter. He said that the deceased was his son and was survived by himself (PW1), his mother, brothers and sisters and was aged twenty five (25) at the time of his death.

The plaintiff said that the deceased was a handcart pusher who earned about Ksh. 5,000/= every fortnight

and that he (PW1) incurred expenses for the funeral of the deceased.

William Morusike (PW2), a handcart pusher, witnessed the accident. He said that the deceased was pushing his handcart loaded with blocks while on the side of the road when the defendant's vehicle approached at a high speed and moving in a zig-zag manner prior to hitting the deceased who was off the road. Thereafter, he (PW2) and others took the deceased to hospital where he died on arrival.

IP Njarega Majani (PW3), of the Traffic Base Kitale police station produced the necessary police abstract but said that he was not involved in the investigation of the case. The defendants did not appear for the trial neither did they lead any evidence in support of their defence.

From the pleadings and the evidence adduced in court, the basic issue for determination is whether the material accident was caused by the negligence of the driver of the defendant's vehicle and if so, whether the plaintiff is entitled to damages and to what extent.

Basically, the occurrence of the accident, the defendant's ownership of the material vehicle and the plaintiff's "locus-standi" in instituting this suit are factors which were not disputed.

With regard to liability, there was uncontroverted evidence from William (PW2), showing that the deceased was on his correct side of the road when he was hit and knocked down by the defendant's lorry which at the time was in high speed thereby demonstrating an act of recklessness on the part of its driver and total disregard for other road users including the deceased.

There was no scintilla of evidence from the defendant showing that the deceased was himself negligent and that he contributed in the occurrence of the accident.

Consequently, this court must find and hereby finds that the accident was wholly contributed by the negligence of the driver of the vehicle who invariably was an agent and/or servant of the defendants who must also be held vicariously liable for the consequences of their driver's negligence in the manner of driving the vehicle.

Although the culprit driver was not enjoined in this suit, the defect was not fatal, nor did it invalidate the defendants' vicarious responsibility.

In any event, technicality ought not be applied to defeat a lawful and genuine claim against a party. Such defects would be cured by placing emphasize on Article 159 (d) of the Constitution of Kenya 2010.

With regard to damages, the plaintiff would be entitled to both general and special damages from the defendants.

Evidence led by the plaintiff indicated that the deceased was aged 25 years at the time of his death and that he survived as a hand cart pusher from which he earned about Ksh. 5,000/= either fortnight or monthly. He was said to have been supporting his parents and siblings with that earning. However, no evidence was led to establish the earning but since there was no dispute that the deceased earned a living by pushing handcarts for a fee, a sum of Ksh. 3,000/= would suffice as having been a reasonable earning.

Therefore, for loss of expectation of life, a sum of Ksh. 100,000/=, would be adequate compensation in addition to a sum of Ksh. 20,000/= for pain and suffering.

As for loss of dependancy, a multiplicand of Ksh. 3,000/= and a multiple of 15 years as well as a dependancy ratio of 2/3rd would suffice thereby entitling the plaintiff to Ksh. $3,000 \times 12 \times 15 \times \frac{2}{3} =$ Ksh. 360,000/=.

The plaintiff would also be entitled to proven special damages i.e. Ksh. 21,050/= for the death certificate, police abstract and funeral expenses.

In the upshot, judgment is entered for the plaintiff against the defendant in the total sum of Ksh. 501,050/= together with costs and interest.

[Delivered and signed this 3rd day of April, 2014.]

J.R. KARANJA.

JUDGE.