



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 49 OF 2011

CHARLES MASOSO BARASA & PRISCA LUBYA

(Suing as the legal representative of the estate of

JACOB MUNYANYA BARAZA (DECEASED).....PLAINTIFFS

VERSUS

CHEPKOECH ROTICH1ST DEFENDANT

JOHN KAGWA.....2ND DEFENDANT

JUDGMENT

The plaintiffs, Charles Masoso Barasa and Prisca Lubyia brought this suit as legal representatives of the estate of the late Jacob Munyanya Barasa, who was their brother. They claim compensation against Chepkoech Rotich and John Kagwa, the defendants, as a result of a road traffic accident which occurred on 7/9/2009, along Nakuru-Nairobi Road, as a result of which the deceased met his death. At paragraph 5 of the plaint filed in court on 17/3/2011, the plaintiffs blame the occurrence of the accident on the 2nd defendant, who was the driver of the motor vehicle, KBA 675C, which collided with the deceased, and whom they blamed for inter alia driving the vehicle at an excessive speed, without due care and attention for other road users, failing to ascertain that the road ahead was clear before proceeding.

The defendants who are the owner and driver of the vehicle respectively, filed a joint defence in which they denied the particulars of paragraph 5 of the plaint and put the plaintiffs to strict proof and in the alternative, at paragraph 8 of the defence, averred that the accident was solely caused by or substantially contributed to by the negligence of the deceased and is blaming the deceased, averred that he walked on the road which was unsafe and dangerous to do so; he failed to keep any proper look out or have sufficient regard to traffic crossing or attempting to cross without ensuring it was safe and failing to give way to motor vehicle KBA 675C.

Four witnesses testified in support of the plaintiff's case.

PW1, Charles Masoso Barasa, a brother to the deceased recalled that on 7/9/2010, the deceased left him in the house at about 6.10 p.m. as he headed to work at 81 Tank Battalion. On 8/9/2009, while at work, he received a report that the deceased had been involved in a road accident. He started to search for the

deceased and he learnt from his place of work that he had died. PW1 produced the death certificate (PEX.1) and a payslip for July 2010 to show that he earned Kshs.36,211/- (PEX.2). He made a report to police station, was issued a police abstract (MFI 3). He obtained limited grant to file this case (PEX.3). He produced the chief's letter from their home area (PEX.5); a search certificate from KRA confirming ownership of the vehicle involved in the accident (PEX.6). He also produced the birth certificate of the deceased's daughter whose mother was said to have disappeared (PEX.8).

The eye witnesses to the accident were PW2, Sospeter Inzoberi and PW3, Asman Ndungu Nanguo.

PW2, Sospeter Inzoberi, told the court that he was a friend of the deceased. On 7/9/2010, he was coming from Free Area going to work. when he met the deceased who was going to work at 81 Tank Battalion; that they were walking besides the Nakuru-Nairobi Road facing Nakuru when a vehicle came from Nairobi direction, lost control and hit the deceased who was walking about 4m ahead of him. When he was hit, the deceased fell onto the road. They were on the side of the road from Nairobi towards Nakuru. He said that the vehicle stopped, the occupants of the vehicle picked up the deceased and left with him before the police came to the scene. He described the vehicle as grey, a trooper. He told the court that even though the deceased used to drink alcohol, he had not drunk on that day.

PW3, Asman Ndungu Nanguo, told the court that on the evening of 7/9/2010, he was going to work about 6.15 p.m. He was with Sospeter Abuony, Fabian Tarus and Jacob Barasa. As they waited to cross the Nakuru-Nairobi Road, just before near the junction to Free Area, a vehicle appeared suddenly – it was being driven from Nairobi towards Nakuru. They were on the left side of the road facing Nakuru. The vehicle came towards them before they started crossing and hit Jacob Barasa who fell in the lane going into Free Area. The deceased was still alive, was placed in the vehicle that hit him and was taken to hospital. He remained at the scene for about 30 minutes but no police officers arrived and he went to report to work. He denied that the deceased was drunk or that he was hit while in the right lane of the road as one faces Nakuru direction.

PW4, PC Samuel Muiruri, a police officer based at Nakuru Police Station on traffic duties produced the police file relating to the accident between motor vehicle KBA 675C and a pedestrian, Jacob Barasa. He produced police abstract filled on 30/11/2010, when the case was still under investigation. He produced the first report made at 12.05 a.m. though police did not visit the scene. The Investigation Officer recommended that the file be placed before a magistrate for an inquest to be conducted but none was ever done. He also referred to a road view drawn on 8/9/2010 at 11.30 a.m. He said that the driver claimed to have been driving at 75kph yet, the scene being within the Municipality, the speed limit should have been 30-50kph. He agreed the since the driver accepted having applied emergency brakes, he was driving in high speed at the time of the accident.

The defence called two witnesses. DW1, Chepkoech Rotich, who recalled that on the fateful day, she was travelling from Nairobi with her driver in an Isuzu Big Horn in make, (Blue in colour). She said that when driving in the 3rd lane in the right facing Nakuru, a person suddenly appeared from the crowd on the left side of the road, the driver swerved to avoid the person but the vehicle hit him. The vehicle stopped, they checked on the person who was hit and found he was alive. They decided to take him to hospital; that a police vehicle arrived helped carry the deceased to the vehicle and the police officer helped them get attended at emergency. DW1 faulted the deceased for crossing when it was not safe to do so. She also said that he vomited and the vomit smelt of alcohol. PW1 admitted that this area is densely populated and traffic was high.

The driver of the vehicle, John Macharia (DW2) reiterated DW1' evidence. He said that he was in right lane facing Nakuru when a person walked in the road. Though he would have hit him directly, but he swerved and he was hit at the waist. He confirmed that after stopping, people gathered but a police vehicle arrived and helped take the person to hospital. DW2 also said the deceased smelt alcohol and he blamed the deceased for the occurrence of the accident. He admitted that he was doing between 50 to 70kph yet he knew the speed limit to be 50kph, the scene being within the Municipality.

It is not in dispute that the defendants' vehicle was in collision with Jacob Barasa, the deceased on

7/9/2010 at about 6.30 p.m. along Nairobi-Nakuru Highway as a result of which the deceased was fatally injured. The question is who is to blame for the collision, the deceased or was it due to the negligence of the 2nd defendant or are both to blame and if so, to what extent was each to blame?

PW2, Sospeter and PW4, Asman claimed to have been with the deceased waiting to cross the road near the junction to Free Area, on the road from Nairobi towards Nakuru. It is the defence contention that the two were not present at the scene. PW2 stated that they were waiting on the side of the road and that when the vehicle hit the deceased he fell onto the road. According to PW2 the vehicle lost control and hit the deceased when off the road. PW3 on the other hand said that they were standing at a place where there are 3 lanes, the 3rd one branches into Free Area. He said he saw the vehicle come towards them and he ran and fell onto the lane leading to Free Area.

According to PW2 and PW3 the deceased was hit while off the road on the left side of the road and was not yet crossing the road. To the contrary, DW1 and DW2 contend that the deceased was hit while on the right side lane was one faces Nakuru from Nakuru meaning the deceased was hit while in the middle of the road. Once the accident occurred the defendants disturbed the scene when they took away the deceased. They did not report the accident and come with police to the scene on the same night. Had that happened, at least there would have been evidence of the exact point of impact. A police officer went to the scene the next day at about 11.30 a.m. as per the police file. This being a very busy road the scene had not been visited for over 17 hours after the accident. The road view drawn by the Investigation Officer the next day was based on the driver's version of how the accident occurred. The police never carried out an inquiry as is required of them in such a case. Though PW1 said that no witnesses wrote statements, PW1 the brother of the deceased and another, made statements to the police and that should have been a starting point. The evidence of the plaintiffs and defendants being at variance, and if I were to take DW1 and DW2's evidence to be the truth, because according to them, the deceased was hit and fell in the right lane on the road heading to Nakuru, it means he had crossed part of the road already. DW2 said he avoided to hit him directly and hit him from an angle. If the driver had been observant and driving at the reasonable speed, he would have been able to brake and avoid to hit the deceased. It is not in contention that Free Area is a busy area, densely populated with zebra crossing nearby. It is also within the Municipality and therefore the speed limit is 50kph. **Section 42(3) of the Traffic Act** provides that:-

“(3) No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit any other person to drive, any vehicle at a speed exceeding fifty kilometres per hour on any road within the boundaries of any trading centre, township, municipality or city.”

In his statement the 2nd defendant admitted to have been driving at 75kph, 25kph in excess. He also claimed to have applied emergency brakes. If he was doing 50kph or less and kept a proper look out, he would have been able to avoid the accident. From the evidence before the court, I am satisfied that the driver of the vehicle was over speeding, did not take into account that the speed limit on that road or that spot was a busy one and therefore failed to take extra care for the other road users. On the other hand PW2 and PW3 never went to record statements at the police station and yet the deceased is a person they knew well. To discredit PW5's evidence, he was asked what vehicle was involved in the accident and he said it was a grey vehicle, trooper. DW1 said that vehicle is blue in colour. Grey and blue are very close colours and I am convinced PW1 was at the scene. One is, however, left wondering why they did not report and yet are ready and willing to come and testify in this matter.

DW1 and DW2 alleged that the deceased was drunk, because he vomited when they reached the hospital and the said vomit smelt of alcohol. However, that is not one of the particulars of negligence listed in their defence and attributed to the deceased. Further, there is no medical evidence that the deceased was drunk and therefore caused accident.

If the court is to go by the road view in the police file and the defence evidence as to the occurrence of the accident then I would agree with defendant alternative plea that the deceased did contribute to the occurrence of the accident in that he did not check and ensure that the road was clear before crossing. He owed himself a duty of care too. I also take cognisance of the fact that DW1 was over speeding. I

therefore attribute 20% liability as against the deceased while the defendants bears 80% jointly and severally.

The plaintiff's claim falls both under the **Law Reform Act** and the **Fatal Accidents Act**. Under the **Law Reform Act**, the damages that can be awarded fall under two heads; (1) pain and suffering and (2) loss of expectation to life.

Pain and Suffering:

The plaintiffs submitted an award of Kshs.20,000/- and relied on the decision of **Rispa Ogema Elijah v Ali Salim Transporters & Another** HCC 6/1995. On the other hand, the defendant suggested an award of Kshs.5,000/- relying on the decision of **Floice Adema Orami v Kezia Muthoni Ngure & 20 Others** HCC 301/2002. The deceased was alive after the accident. DW1 and DW2 who took him to hospital told the court that he was still alive when he reached hospital. It is not clear exactly when the deceased died but it must have been on the same night because when PW1 went to Provincial General Hospital he had died. Having died within hours of the accident, I will make an award of Kshs.15,000/-.

Loss of Expectation to Life:

On this head, the plaintiffs submitted an award of Kshs.80,000/-. Counsel relied on the decision in **Mary Muthoni Gachau v The Attorney General & 2 Others** HCC 165/1993 in which the deceased was aged 51 years and an award of Kshs.100,000/- was made. In this case the deceased was aged 28 years at the time of death. On the other hand the defence counsel submitted an award of Kshs.5,000/- under this head relying on the decision in **Satwidner Singh Bhogal v Satwidner Kaur Benawra & 2 Others** in which an award of Kshs.70,000/- was made. In my view, an award of Kshs.80,000/- will suffice under this head.

Under Fatal Accidents Act:

Loss of dependency.

The deceased was aged 28 years at the time of death. He was working with the Army. As per the payslip for the month of July 2010, his gross salary was Kshs.36,311/-. It was urged that the deceased may have worked for another 35 years because the retirement age is now 60 years. The defendant on the other hand submitted that the plaintiff had not established that the deceased worked with the Army as alleged because only one payslip was produced in evidence and nobody was called from the Armed Forces to establish that indeed the deceased worked with the Armed Forces. It is therefore the defendant's submission that the sum to be used as a multiplicand is Kshs.9,024/- which is the minimum wage in Kenya. The deceased's payslip was produced in evidence by consent. At no time did the respondent indicate that they doubted that the deceased worked with the Armed Forces. The death certificate and Chief's letter too indicate that the deceased worked with Armed Forces. Though evidence from the Armed Forces would have clarified what the deceased worked as and the terms of retirement. In my view, on a balance of probabilities the plaintiff has demonstrated that the deceased was working with the Armed Forces. The multiplicand in my view is the basic salary which was Kshs.22,056.00 but not the gross or net.

The deceased was only 28 years old at the time of death. It was the defendant's submission that the system of retirement in the Armed Forces was not the same as the Civil Service because if one was not promoted for 9 years, then he retires and that under Section 255 of KDF Act (199) if one's services were not required he could be discharged from the force. The defendant therefore suggests that a multiplier of 8 years of active service as being reasonable. Reliance was made on the case of **Boniface Ndenga v The Hon. Attorney General**, HCC 4598/92, where the deceased was a police officer aged 28 years and a multiplier of 12 years was adopted. The plaintiff's counsel did not specifically respond to this submission but suggested a multiplier of 24 years relying on the case of **Fredrick Gataka Mungai v George N. Kibunyi**, HCC 1993/1990, where the deceased was aged 24 years and a multiplier of 26 years was applied. The onus was on the plaintiff to adduce evidence on the terms of service of the Armed Forces

which they did not. The deceased was not an officer. Section 174 of the KDF Act seems to suggest that the term of enlistment for a serviceman is not more than 12 years subject to removal but the period should not exceed 21 years provided that the officer had not attained the age of 45 years. The deceased had 17 years left to reach 45 years. Considering the exigencies of life, I will allow a multiplier of 15 years.

Evidence was led that the deceased left a minor child, Donar Amboka, born on 17/8/2002. By 2010 when the deceased died she was only 8 years old. She was totally dependent on the deceased and I will assign a multiplicand of 2/3. The dependency ratio will therefore be calculated as follows:-

$$22,056 \times 15 \times \frac{2}{3} \times 12 = 2,646,720.00 \text{ - general damages}$$

The only special damages that were pleaded are at paragraph 7 of the plaint at al beit Kshs.25,000/- which are costs incurred in applying for grant. The firm of Gekonga & Co. Advocates issued a receipt to Charles Masoso Barasa for the said sum on 15/2/2011. The said receipt bear a revenue stamp and I am satisfied that special damages are proved as pleaded. In the end, the plaintiff will have judgment as follows:-

1. Loss of dependency	- Kshs.2,646,720.00
2. Special damages	- <u>Kshs. 25,000.00</u>
Total	- <u>Kshs.2, 671,720.00</u>
Less	
(1) Pain and suffering	- Kshs. 15,000.00
(2) Loss of expectation of life	- <u>Kshs. 80,000.00</u>
Less contribution of 20%	
(80/100 x 2,576,720.00)	- <u>Kshs.2,061,376.00</u>

The plaintiff will also have costs of the suit.

DATED and DELIVERED this 30th day of May, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Kitili holding brief for Mr. Gekonga for the plaintiffs

Mr. Wahome for the defendants

Kennedy – Court Assistant

