REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 98 of 2008

BENJAMIN K. KOECH:::PLAINTIFF
VERSUS

ROBERT T. NGETICH:::1ST DEFENDANT

SHADRACK K. RUTO::2ND DEFENDANT

JUDGEMENT

The case before me was heard by Mwilu J. as she then was. It is the said learned Judge who received the evidence from the three (3) witnesses who testified for the plaintiff.

Thereafter, the defendant opted to call no evidence.

It then fell fell into my hands, to write the judgement.

The plaintiff is the husband to **BETSY CHEBET CHEMIRON**, who died in an accident involving two vehicles. The said two vehicles had the registration numbers KXY 109 and KAD 007W, respectively.

It is the plaintiff's claim that his wife was traveling in the vehicle registration KXY 109, when the lorry, registration KAD 007W collided with it violently, resulting in the demise of his wife.

According to the plaintiff, the lorry was owned by the 1st Defendant, **ROBERT NGETICH.** Therefore, the plaintiff asserted that the 1st Defendant was vicariously liable for the actions and omissions of the 2nd Defendant, who was driving the vehicle at the time of the accident.

In the Defence, the defendants denied all the assertions made by the plaintiff. They denied that the 1st Defendant owned the lorry. They also denied that the 2nd Defendant was driving the lorry at the material time.

The defendants even denied the assertion that there was any accident as alleged.

At the trial, the plaintiff called 3 witnesses.

PW1, BENJAMIN KIPLAGAT KOECH, is the plaintiff. He testified that the Late Betsy Chebet was his wife. The two of them were married under Kipsigis Customary Law.

Exhibit 1 was a letter from **Senior Chief Kimutai Chumo** of Kapkatet Location. Through that letter, the chief confirmed that the plaintiff, who was a resident of Kapkatet Location, was married to **Betsy Chebet Chemiron.**

PW1 also produced the Death Certificate for his wife. It showed that the lady passed away on 10th July, 2002, at the age of 40.

It was the evidence of **PW1** that his wife was a passenger in a Toyota Saloon vehicle, registration KXY 109. The wife was travelling from Kericho to Eldoret, to attend the music festival.

It was during that trip that the vehicle in which PW1's wife was travelling, was involved in an accident with the lorry, KAD 007W.

PW1 produced the payslip for his wife, showing that her gross salary was Kshs. 14,422/-, whilst the basic salary was Kshs.9,999/-. The payslip that was exhibited was for October, 1999.

PW1 also produced a letter from the Teachers Service Commission, dated 21st July, 2002. The letter was addressed to the deceased, through the office of Head Teacher of Chililis Girl's Secondary School, where the deceased used to work.

From the letter, it is clear that the salary of **Chemiron B. Chebet** had increased to Kshs. 14,556/-, with effect from 1st July, 2002. The lady was also promoted to Approved Teacher Status 1.

PW1 testified that the deceased and he, had 3 children, namely;

(1) ***Daisy Cherotich;***

(2) ***Collins Kipngetich; and***

(3) ***Doreen Chepngetich.***

He added that his wife used to help him in paying school fees and medical care.

Following the death of his wife, the plaintiff says that he lost her consortium.

Finally, after obtaining Letters of Administration, the plaintiff brought this action on his own behalf as well as on behalf of his 3 children.

During cross-examination, PW1 conceded that he did not witness the accident. He also admitted that he had not exhibited any search results for the ownership of the lorry, KAD 007W.

When questioned as to whether or not he had re-married, PW1 answered in the negative.

PW2, JANE NJERI, testified that she was travelling in the private car registration KXY 109. She was together with 2 teachers, namely **Mr. Rotich** and **Mrs. Betsy Chebet Koech.**

PW2 said that they were travelling to Eldoret for Music Festivals.

At the area known as Mbevere, along Nandi Hills – Chemelil Road, the vehicle they were in was involved in an accident.

PW2 said that the lorry KAD 007W was swaying on the road. When the driver of the saloon vehicle noticed the lorry swaying, he stopped off the left side of the road. Notwithstanding the steps taken by the driver of the car, the lorry knocked the car, pushing it into a tree. As a consequence, all the passengers in the car died, save for only **PW2.**

PW2 blamed the driver of the lorry for hitting the car, as the car was on the rightful side of the road.

During cross-examination, **PW2** said that the accident occurred at about 6.30a.m. At the said hour, it was still dark.

PW2 testified that she was seated at the back, on the left-hand side.

But when she was questioned further, **PW2** said that she could see the road, and that she did infact see the lorry as it was coming towards the car. She first saw it when it was about 20 metres away.

According to **PW2,** the lorry was moving at high speed and was swaying.

PW2 concluded her evidence by saying that the impact showed that the car had stopped off the road, on its correct side of the road.

PW3, CHIEF INSPECTOR RICHARD KAPTUM, was the OCS Songhor Police Station. He produced a Police Abstract dated 30th October, 2002.

The abstract is in relation to an accident involving two vehicles, bearing the registration KXY 190 and KAD 007W, respectively.

It was the testimony of PW3 that the lorry KAD 007W was owned by **ROBERT NGETICH** of Moi University.

PW3 also testified that the person who was driving the lorry was **SHADRACK KIMELI RUTO.** The said Ruto was charged with the offence of driving on a public road without a Driving Licence.

During cross-examination, PW3 said that Ruto should not have been driving on the road, as he did not have a Driving Licence.

However, PW3 also conceded that the 2nd defendant was not charged with either careless driving or causing death by dangerous driving.

After PW3 testified, the plaintiff closed his case.

Thereafter, the defendant decided to call no evidence at all.

The plaintiff's advocate, **Mr. Omusundi,** submitted that the plaintiff had proved that the defendants were 100% liable for causing the accident.

He then claimed the following sums as compensation under the various heads;

(a)General Damages for pain and suffering - Kshs. 100,000/-.

(b)General Damages for loss of Expectation of life - Kshs. 150,000/-.

(c)General Damages for Funeral Expenses and for Application for Letters of Administration - Kshs. 30,000/- and 10,155/- respectively.

(d) General Damages for loss of consortium - Kshs. 100,000/-

(e) Under the Fatal Accidents Act; General Damages for loss of Dependency Kshs. 5,189,800/-

In total, the plaintiff's claim amounted to Kshs. 5,579,955/-

In answer to the plaintiff's claim, the defendants invited this court to dismiss the suit.

It was pointed out that PW1 did not witness the accident, and also did not make available a copy of the records for the lorry which is alleged to have caused the accident.

As regards PW2, the defendants submitted that her evidence was contradictory. **Ms Koech**, learned

advocate for the defendants submitted that because it was dark, it would have practically impossible for PW2 to have seen the oncoming lorry. That was even more improbable because PW2 was seated at the back of the car.

If PW2's evidence was discredited, the defendants submit that the plaintiff would have failed to discharge the onus of proving that the 2nd Defendant was negligent.

The defendants also submitted that the plaintiff failed to prove ownership of the lorry. They said that the evidence in the police abstract had been contradicted by that of the Certificate of Search from the Registrar of Motor Vehicles. As far as the defendants were concerned, the lorry in question belonged to **UNGA MAIZE MILLERS LIMITED.**

I must confess that I was completely perplexed by the defendants' said submission. That is because there is no Certificate of Search from the Registrar of Motor Vehicles. Indeed, the defendants faulted the plaintiffs for failing to place before the court, the results of any search from the Registrar.

And the defendants also made a conscious choice to call no evidence. Therefore, there is no Certificate of Search from the Registrar of Motor Vehicles, which is in evidence before this court.

There is also no evidence before me, upon which the defendants could anchor their contention that the lorry belongs to Unga Maize Millers Limited.

The first piece of evidence which is before me, in relation to the question of ownership is that produced by the plaintiffs. It shows that the name of the 1st defendant was written on the side of the lorry.

The second piece of evidence about the ownership is contained in the police abstract. It gives the particulars of the owner of the lorry as follows:-

> **"MR. ROBERT NGETICH**
> **C/o MOI UNIVERSITY**
> **P.O. BOX 1692**
> **ELDORET**

As the defendants did not adduce any evidence on the issue of ownership, I find and hold that the only evidence available to this court shows that the 1st Defendant was the owner of the lorry registration KAD 007W.

In so holding, I do appreciate that the best evidence of ownership of the vehicle would have been the certificate issued by the Registrar of Motor Vehicles.

In **THURANIRA KARAURI -VS- AGNES NCHECHE, CIVIL APPEAL NO. 192 OF 1996** (unreported), the Court of Appeal death with a case in which the defendant had denied ownership of a vehicle, just like in this case. This is what the court said:

> ***"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff submitted that the information in the police abstract, that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."***

I appreciate that the decision by the Court of Appeal is binding on me. And I believe that the holding above was based on Section 8 of the Traffic Act. That section reads as follows:-

> ***"The person in whose name a vehicle is registered shall, unless the contrary is proved, be***

deemed to be the owner of the vehicle."

In my understanding of that section, the fact of ownership may be proved through other evidence if it is contrary to what is shown on the register maintained by the Registrar of Motor Vehicles.

In other words, the fact that a person is registered as the owner of a vehicle is evidence of ownership by that person.

In the same vein, the fact that the name of a person is written on the side of a lorry may not be conclusive evidence that he is the owner of that lorry. But I hold the view that when such evidence is placed before the court, and thereafter the defendant chooses to say nothing about it, the evidence remains uncontroverted. It remains as a pointer to the person who is the owner.

The defendants lawyer has tried to sneak in evidence of ownership through his written submissions. I categorically reject any such attempt, and remind the advocate that evidence can only be adduced through witnesses. As the defendants decided to offer no evidence at all, the only evidence on the question is that tendered by the plaintiff. And as the evidence was uncontroverted, I find that, on a balance of probability, the plaintiff has proved that the 1st Defendant is the owner of the lorry.

In **ANNE WAMBUI NDIRITU -VS- JOSEH KIPRONO ROPKOI & ANOTHER, CIVIL APPEAL NO. 345 OF 2000,** the Court of Appeal distinguished between the legal burden of proof, which lies on the party who invokes the aid of the law and substantially asserts the affirmative of the issue, and

"..... the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence."

Taking into account the fact that the defendant had asserted that the accident had been caused by the defendant, whilst the defendant asserted the contrary, the Court of Appeal went on to say:

"issues were subsequently joined on such pleadings. In the event each party was under a duty to prove their own assertions....."

That legal pronouncement is applicable to this case too.

Therefore, whilst the plaintiff has a legal duty to prove his claim against the defendants, both sides were under a duty to prove their own assertions on matters of fact. But the defendants chose to tender absolutely no evidence. They therefore failed to prove any of the factual assertions set out in the defence.

Legal submissions cannot be a substitute for factual evidence. If anything, legal submissions ought to be founded upon evidence. When submissions are not founded upon evidence, they are without any foundation. They are hypothetical.

PW2 testified about how the accident occurred. She was the only survivor from the car in which the wife of the plaintiff was travelling.

She said that the accident took place at 6:50a.m., when it was still dark. Had not the defendants delved into cross-examination of PW2 after she gave that evidence, it may have been possible for them to, thereafter, argue that PW2 could not have seen what happened.

But the defendants asked PW2 questions, to which she said that she was able to see the road ahead. PW2 said that she saw the lorry, which was moving at a high speed, and which was swaying. She also said that the car they were travelling in had stopped on the side of the road, before the lorry knocked it, pushing it into a tree.

The driver of the lorry was obviously at the scene of the accident. But he decided not to give any evidence. In the circumstances, the evidence of PW2 was uncontrverted.

She may have been sitting at the back of the car, but she saw the lorry. PW2 saw the lorry moving at a high speed, as it was swaying. No other witness gave any version that was inconsistent with that given by PW2.

Having accepted the evidence of PW2, I find that the plaintiff has proved that the 2nd defendant was negligent. He drove at a high speed, and knocked the car which had already stopped on the side of the road.

The cause of death, as stated in the Death Certificate was Cardio Pulmonary Arrest due to internal Haemorrhage, due to Multiple rib fractures, due to cervical cord compression.

In my understanding, the injuries described, support the evidence of PW2, regarding the force with which the lorry knocked the car, forcing it onto a tree.

There is therefore no doubt at all that the 2nd defendant was negligent.

Of course, it is clear that the lorry driver was not charged with either careless driving or with causing death by dangerous driving. But PW3 did not explain the reasons why. He would not have been able to do so, because he was based at Mogotio Police Station in July 2002, when the accident occurred. He only moved to Songhor Police Station in July, 2004.

Meanwhile, in the police abstract dated 30th October, 2002, a decision had already been made to charge the 2nd defendant with the offence of Driving on Public Road without a Driving Licence.

The decision to prefer that charge against the 2nd defendant is not, of itself, evidence that the said defendant was not negligent.

To prove his assertion that he was not negligent or to disprove the evidence of PW2 on the issue of his negligence, the 2nd defendant should have given evidence. He did not.

As the driver of the car had already stopped off the road, I find the 2nd defendant 100% liable for the negligence which caused the lorry to knock the car.

At this point, I feel obliged to point out that on 10th March, 2010, the parties to this suit filed a statement of Agreed Issues. The statement is dated 3rd March, 2010, and bears the signatures for the advocates for both the plaintiff and the defendants.

In that statement, there is not question regarding the ownership of the lorry.

However, as the 1st defendant would only be held vicariously liable if he was the owner of the lorry, I believe that it was still necessary for the court to have dealt with the issue of the ownership of the lorry.

QUANTUM OF DAMAGES

(a) **SPECIAL DAMAGES:**

(i) The plaintiff paid Kshs. 10,155 to Sila Munyao & Company Advocates, as fees for the application for Letters of Administration. Therefore, he is entitled to that sum.

(ii) Funeral Expenses - Kshs. 30,000/-

Although no receipt was produced by the plaintiff. I find that the sum claimed is reasonable. I so find because the court has taken judicial notice of expenses incurred in funerals. In that regard, I find support from the decision in **APOLLO NYANGAYO HONGO -VS- KENYA BUS SERVICE COMPANY LIMITED & ANOTHER, HIGH COURT CIVIL CASE NO. 70 OF 2002 (AT KERICHO)**

(b) **GENERAL DAMAGES:**

(i) **LOSS OF EXPECTATION OF LIFE:**

The plaintiff claims Kshs. 150,000/-, whilst the defendants suggest Kshs. 50,000/-.

I award Kshs. 100,000/- on the strength of the authority cited by the defendants, wherein the Court of Apeal upheld the sum of Kshs. 100,000/-. The case I am talking about is **ANNE WAMBUI NDIRITU -VS- JOSEPH KIPRONO ROPKOI, CIVIL APPEAL NO. 345 OF 2000**

(ii) **PAIN & SUFFERING:**

The plaintiff asks for Kshs. 100,000/-, but the defendants suggest Kshs. 10,000/- on the grounds that the lady died instantly.

PW2 confirmed that the lady and the other passengers died on the spot.

Even in the authority of **MONICA JEROP LANGAT -VS- MAJOR KIPLAGAT ARAP NGENO & 2 OTHERS, HCCC NO. 88 OF 2004,** which was cited by the plaintiff, the court awarded 10,000/- for pain and suffering. In that case, the deceased died instantly.

In contrast, the deceased in he case of T**ERESIA NJERI -VS- KENYA BREWERIES LIMITED & ANOTHER HCC NO. 374 OF 1997 (at Nakuru),** died after a month. It is in those circumstances that the court awarded Kshs. 75,000/-.

In the event, I award Kshs. 10,000/-

(iii)**LOSS OF CONSORTIUM AND SERVITIUM:**

The plaintiff claimed Kshs. 100,000/-, but the defendant said nothing under this head. That claim is in tandem with the award in **MONICA JEROP LANGAT -VS- MAJOR KIPLANGAT ARAP NGENO & 2 OTHERS (above-cited); and also with BENJAMIN MWILOLE -VS- GEOFFREY SAID & ANOTHER, HCCC NO. 4 OF 1985 (at Mombasa).**

I therefore award Kshs.100,000/-

(iv) **LOSS OF DEPENDENCY:**

The plaintiff was a peasant farmer. He said that it is his late wife who used to help him in paying school fees for their 3 children. She also helped in paying medical bills.

As the deceased died at 40, the plaintiff asked for a multiplier of 25. but the defendants suggested a multiplier of 10.

Although the defendants said that it would be fair to say that the lady would have worked for another 10 years, there is no reason for that assertion.

The retirement age for public servants in Kenya is currently 65, but by the time the lady died in 2002, the retirement age was 55.

I therefore find that the correct multiplier should 20. In arriving at that number, I have taken into account the fact that if the lady had continued living, she would have become a beneficiary of the change in government policy, which increased the retirement age to 65.

At the same time, I have taken into account the fact that in calculating the sum due to the plaintiff, there is need to make an allowance for the fact that if the compensation is paid, there would be an accelerated receipt of the money concerned, in contrast to the period in which it would have been earned gradually.

As regards the income, the plaintiff claims Kshs. 25,949/- per month, as the gross income. However, the defendants say that the income is Kshs. 16,500/-.

Although the plaintiff suggests Kshs. 12,130/- as basic pay; Kshs. 12,00/- as House Allowance; Medical Allowance Kshs. 1,819/-, the letter from the Teachers Service Commission does not reflect the increaments to Medical Allowance and House Allowance.

Therefore, it is only the basic salary which has been proved as having been increased from Kshs. 9,999/- to Kshs. 12,130/-.

Although the defendants have been magnanimous in citing the income of the deceased at Kshs. 16,500/-, the only evidence I have found adds up to Kshs. 14,556/-.

I also note that whilst the plaintiff says that the deceased used to spend upto 2/3 of her income on him and the children, the defendants suggest only 1/3.

Whilst it may be true that the children did not only live off their mother's income, but also from the income which the plaintiff made as a peasant farmer, I do not think that that is what determines the dependency ratio. To my mind, the dependency ratio is determined by reference to the portion of the income which the person was spending on the rest of his family. I find that the deceased used to spend 2/3 of her salary on the rest of her family. It is that which the family has lost following her death.

Therefore, the compensation under the Fatal Accidents Act is calculated as follows:-

14,556 x 20 x 12 x 2/3

By my calculations the total sum under that head is Kshs. 2,328,960/-.

In conclusion, the sums payable as compensation will be;

(a) SPECIAL DAMAGES

(i) Letters of Administration - 10,155/-

(ii) Funeral Expenses - 30,000/-
Sub-Total - **40,155/-**

(b) GENERAL DAMAGES

(i) Loss of Expectation of life - 100,000/-

(ii) Pain of Suffering - 10,000/-

(iii)Loss of Consortium - 100,000/-

(iv) Loss of Dependency - 2,328,960/-

Sub-Total - **2,538,960/-**

If the whole amount of the compensation for loss of dependency is to go to the same dependants as those who will get the compensation for loss of expectation of life, that would constitute duplication.

Therefore, the final sum must be reduced by Kshs. 100,000/-.

In the result, I award Kshs. 40,155 as Special Damages and Kshs. 2,438,960/- as General Damages. The said sums will attract interest at Court Rates from the date of Judgement.

I also order the defendants to pay to the plaintiff, the costs of this suit.

DATED, SIGNED AND DELIVERED AT ELDORET
THIS 29TH, DAY OF APRIL, 2013

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FRED A. OCHIENG
JUDGE