



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 42 OF 2007

RICHARD OSORO

JINDIGA

**(Suing as legal representative of GEOFREY SINDIGA OSORO,
DECEASED).....PLAINTIFF**

VERSUS

1.ALEX

THANGEI

2.CLAUSE MWANGI.....

.....DEFENDANTS

J U D G E M E N T

1. The suit is a claim for damages in negligence arising out of the death of **GEOFREY SINDIGA OSORO** (hereinafter called the **Deceased**). The Deceased died in a road accident along Ngong Road, near Karen Nairobi on 11th March 2004. He was a passenger in motor vehicle registration number KAR 287 J (**accident vehicle**). The Plaintiff was the father of the Deceased and is the administrator of his estate. General damages are claimed under the **Law Reform Act, Cap 26** (on behalf of the Deceased’s estate) and the **Fatal Accidents Act, Cap 32** (on behalf of the Deceased’s dependants). Special damages are also claimed.

2. The Plaintiff’s case as pleaded in the **further amended plaint dated 11th October 2010** is that the Deceased was a lawful passenger in the accident vehicle which was owned by the 1st Defendant and driven by his agent, the 2nd Defendant; that the 2nd Defendant so negligently drove, managed and controlled the vehicle (particulars are given) as to cause or permit it “to collide into a tree (and) to cause (it) to overturn”; that the Deceased received fatal injuries in the accident; and that the estate of the Deceased and his dependants thereby suffered loss and damage.

3. The Defendants denied the Plaintiff’s claim in their **further amended defence dated 19th October 2010**. Though they admitted that the accident occurred, they denied that the Deceased was a lawful passenger in the vehicle, or that the accident was caused by the negligence of the 2nd Defendant. They further denied that the accident vehicle collided into a tree and overturned as alleged.

4. The Defendants also pleaded that if the Deceased died from injuries sustained in the accident, the injuries were caused or substantially contributed to by the Deceased. Particulars of the Deceased's negligence were pleaded as follows -

- (i) Boarding an over-crowded motor vehicle "and remaining there, hence exposing himself to imminent risk".
- (ii) Failing to fasten his safety belt provided in the car.
- (iii) Breaking Traffic Rules and Regulations made under the Traffic Act (particulars of the rules and regulations breached were not given).

The Defendants sought dismissal of the Plaintiff's suit.

5. At the commencement of the trial the following documents of the Plaintiff were by consent admitted in evidence.

- (i) **Death CertificateExhibit P1**
- (ii) **Burial PermitP2**
- (iii) **Police Abstract on Accident.....P3**
- (iv) **Diploma (sales & MarketingP4**
- (v) **Letter of Admission to UniversityP5**
- (vi) **Letters of AdministrationP6**
- (vii) **Bundle of ReceiptsP7**
- (viii) **Demand NoticeP8**
- (ix) **Copy of Rewards (KAR 287 J)P9**

6. The Defendants did not have any documents.

7. The Plaintiff testified as PW1 and called one witness, **Roy Isaboke Mageto** (PW2). The Defendants did not lead or call any evidence.

LIABILITY

8. It is admitted in the written submissions filed for the Defendants that the Plaintiff is the legal representative of the estate of the Deceased. It is also conceded that the accident pleaded involving motor vehicle registration number KAR 287 J occurred, and that the 1st Defendant was the registered owner of the motor vehicle. That the 2nd Defendant was the driver of the motor vehicle at the time of the accident is also not in doubt.

9. Liability is denied by the Defendants on three grounds –

- (i) As for the 1st Defendant, that the Deceased was not an authorized passenger in the motor vehicle.
- (ii) As for both Defendants, that the accident was not as a result of any negligence of the 2nd Defendant.

(iii) That if the Deceased died from injuries received in the accident, he suffered the injuries due to his own negligence, or substantially due to his own negligence.

Was the Deceased an authorized passenger in the accident vehicle?

10. The 1st Defendant did not testify or call a witness. There was no evidence placed before the court that he had specifically or at all prohibited the 2nd Defendant to carry any passengers in the accident vehicle. The vehicle was a car, not a cargo vehicle like a pick-up truck or a cargo van. When you send a young man on an errand by car such as the one the 2nd Defendant was on, you should expect that he would in all likelihood invite his friends to come along for the ride. Young people do that all the time! It is not an unreasonable likelihood.

11. I find that the Deceased had the constructive authority of the 1st Defendant to be in the accident vehicle.

Was the accident caused by the negligence of the 2nd Defendant?

12. PW2 was the only eye-witness to the accident who testified. His testimony was that he was sitting in the front passenger seat of the accident vehicle; the 2nd Defendant was driving at about 80 kph in his estimation; just past **Karen Police Station** the 2nd Defendant tried to overtake a car that was ahead; and that in the process the right-hand-side wheels of the accident vehicle came off the tarmac and car skidded.

13. PW2 further testified that the 2nd Defendant tried to get the car back onto the road but the car that they were overtaking moved towards them; and that the 2nd Defendant then swerved to the right to avoid it and in the process lost control of the car which went off the road and hit a tree-stump which was about 3½ feet high some 5 meters from the edge of the road.

14. Upon hitting the tree stump, PW2 further testified, the car span and came to a stand-still on its four wheels while facing the reverse direction; that in the meantime one passenger, a girl who was sitting next to the rear door behind the driver, had been thrown out when that door flew open; and that she suffered injuries from which she later died in hospital.

15. PW2 also stated that the Deceased was sitting next to the girl who was thrown out of the car; that when the car came to a stand-still PW2 came out and opened the rear left door and helped out two of the passengers; that he then removed the Deceased from the car: he appeared seriously injured; and that with the help of good Samaritans the Deceased and the injured girl were taken to hospital. Both later died, the Deceased apparently on the same day.

16. PW2 further testified that the tarmac on the road was worn out on the edges, but the road had no pot-holes; that the Deceased was wearing a safety-belt; that there were six people in the car (including the driver); and that four of them (including the Deceased) were sitting in the back seat. He conceded in cross-examination that the back seat was meant for three passengers. He further conceded that it would have been difficult for any passengers at the back to wear a seat belt as there were four of them in a seat designed for three. He stated further in cross-examination that because the road was worn out at the edges, it was narrow and rugged. He thought that the 2nd Defendant was careless in trying to overtake where the road was rugged; otherwise he was driving well.

17. As already observed, the Defendants did not lead or call any evidence. No reasons were given why, for instance, the 2nd Defendant who was the driver of the accident vehicle, could not testify. The testimony of PW2 as to how the accident occurred was thus unchallenged.

18. The effect of the wearing out of the edges of a tarmac road is to narrow it. There is an obvious risk in trying to overtake another vehicle on such a road as there might not be sufficient room between the two vehicles. In trying to create enough room there would be the added danger of going off the tarmac and

thereby risk loss of control.

19. I am satisfied that the 2nd Defendant was negligent in trying to overtake another motor vehicle where he did. The road was worn out on the edges and therefore narrow. There was clearly not sufficient room between the two vehicles, and in the course of overtaking he went off the tarmac and lost control of the motor vehicle and hit a tree stump that was about 5 meters away from the road. The impact of the collision with the tree caused two of the passengers in the car to suffer mortal injuries from which they died while undergoing treatment.

20. The fact that the motor vehicle went off the road and the apparent force of the impact that led to such serious injuries in at least two of the passengers is an indication that the car was travelling at some speed, a speed that was too high given the condition of the road.

Was the Deceased negligent?

21. I attribute the accident entirely to the negligence of the 2nd Defendant. But with regard to liability for the death of the Deceased, though PW2 stated that the Deceased was wearing his seat belt, I do not see how he could have been wearing it with four adults sitting in a seat designed for three. I am not persuaded that he was wearing his safety-belt.

22. Had he been wearing the safety-belt, the Deceased's injuries would in all probability have been mitigated, particularly as the car did not over-turn. By voluntarily entering, or remaining in a car that would thereby be over-loaded, the Deceased must bear a certain measure of contributory negligence. But I must hasten to add that the greater responsibility for the over-loading of the car must be borne by the 2nd Defendant who was in control of the car. A driver should never allow his vehicle to be over-loaded. An over-loaded vehicle is difficult to control in an emergency.

23. I will attribute 30% contributory negligence to the Deceased.

DAMAGES

Under the Law Reform Act

24. Under this statute I will award general damages for pain and suffering and also for loss of expectation of life.

25. The Deceased died apparently some hours after the accident having been removed from the scene of the accident, taken to *Forces Memorial Hospital* and thence to *Kenyatta National Hospital*. There is no evidence before the court that he became unconscious immediately after the accident or at all. He must have suffered terribly before he died. I will award KShs 30,000/00 for **pain and suffering**.

26. As for **loss of expectation of life**, I note that the Deceased was 22 years old when he died. He was just about to start his university studies. He had a whole fruitful life ahead of him that was cut short. I will award KShs 150,000/00 for loss of expectation of life.

Under the Fatal Accidents Act

27. The Plaintiff and the Deceased's mother, **Jemima Osoro**, are of course entitled to damages by dint of **section 4(1)** of the Fatal Accidents Act which provides -

“4.(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit

the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided.....”

Such damages will of course be for the injury and loss occasioned to them by the Deceased's death.

28. The Plaintiff testified that the Deceased was aged 22 years at the time of his death and was healthy. He had been admitted to the University of Nairobi to study for a Bachelor of Commerce degree (**Exhibit P5**), though he had not yet commenced studies. The letter of admission was dated 6th April 2004. The program was to commence on 6th April 2004. The Deceased died on 11th March 2004. It appears that the letter of admission was written about a month after his death. There is nothing sinister in this; the wheels of bureaucracy will always grind on regardless. Besides, the university authorities may not have been informed of the young man's death. The Deceased had also successfully studied at the university for a Diploma in Sales & Marketing (**Exhibit P4**).

29. It is the Plaintiff's case that he and the Deceased's mother would have depended on the Deceased for support in the future; by his death that support would never come. In our country a parent's expectation of support from a child or children has been long recognized by our courts. See the case of **Sheikh Mushtaq Hassn -vs- Nathan Mwangi Kamau Transporters & 5 Others (1982 – 88) I KAR 946**. It is an expectation that is founded on our own cultures and customs, and it is not contrary to law or morality.

30. I estimate that had the Deceased lived, studied and gone on to work, his own living expenses and savings would have eaten up not less than **two-thirds** ($\frac{2}{3}$) of his income. That would have left only about one-third ($\frac{1}{3}$) of his income available to assist his parents with. That will be the **dependency ratio**.

31. As for the **multiplier**, I note that the Deceased was aged 22 when he died. He was of good health. He would have joined university shortly and studied for four (4) years. Give another 2 years to find a job; so, it would not have been until he was about 28 years old that he would have started working. Taking the Public Service retirement age of 60 years, and giving allowance for the uncertainties and vagaries of life, I will award a **multiplier** of 25 years.

32. I will now consider the Deceased's likely **income** had he lived and gone on to work. The Plaintiff led no evidence at all in this regard. I will therefore use the starting salary of a graduate (first degree) in the Public service) which was in 2004 about KShs 30,000/00 per month (with taxation and other statutory deductions discounted).

33. I will therefore award damages under the Fatal Accidents Act in the sum of **KShs 3,000,000/00** made up as follows;

$$\text{KShs } 30,000/00 \times 12 \times 25 \times \frac{1}{3} - \text{KShs } 3,000,000/00$$

Special Damages

34. KShs 135,600/00 was claimed. KShs 159,411/00 was proved, but there was no amendment sought or granted. So I will award the sum claimed of KShs 135,600/00.

SUMMARY

35. I will enter judgment for the Plaintiff on liability at 70%. I will award the following damages (all duly reduced by 30%) –

i. Pain and suffering (30,000/00)	KShs 21,000.00
ii. Loss of expectation of life (150,000/00).....	105,000.00
iii. Under the Fatal Accidents Act (3 million).....	2,100,000.00
iv. Special Damages (135,600/00)	94,920.00
Total	<u>KShs 2,320,920.00</u>

36. The damages awarded under the Fatal Accidents Act shall be apportioned as follows -

- (i) **Plaintiff (Father)**1,600,000.00
- (ii) Jemima Osoro (Mother).....**500,000.00

For the avoidance of doubt, any advocate’s costs and other payments shall come from the Plaintiff’s share and **not** from the share of Jemima Osoro.

37. The awards shall attract interest at court rates from the date of judgment (general damages) and from the date of filing suit (special damages).

38. The Plaintiff shall have costs of the suit, also appropriately reduced by 30%.

39. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 15TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE