



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 1909 of 1998**

**1. JACINTA MUMBI MBITA**

**2. WASHINGTON MUSYOKI (Suing on their behalf and on behalf**

**of the Estate of BONIFACE MUTUKU MASOO**

**(Deceased).....PLAINTIFFS**

**VERSUS**

**1. GEDION NGUTA**

**2. SALIM SINGI MULEI.....DEFENDANTS**

**J U D G M E N T**

**1.** This suit for special and general damages is brought by the Plaintiffs pursuant to the provisions of the **Law Reforms Act (Cap 26)** and **Fatal Accidents Act (Cap 32) Laws of Kenya** for the benefit of the deceased's estate, the 1<sup>st</sup> Plaintiff's benefit, for the benefit of the deceased's parents and child.

The suit against the 2<sup>nd</sup> Defendant abated following his death.

**2.** The Plaintiffs blame the 2<sup>nd</sup> Defendant for the occurrence of the accident and holds the 1<sup>st</sup> Defendant vicariously liable. The Defendants denied the Plaintiff's claim in their respective statements of defence.

**3.** PW1 testified that the deceased died on 3<sup>rd</sup> June, 1996 as a result of an accident which occurred when the deceased was travelling on board the 1<sup>st</sup> Defendant's motor vehicle registration number **KAA 205 Z** as a fare paying passenger along Mombasa Road at Konza junction.

**4.** He stated that following the accident, the deceased was taken to Machakos District Hospital for treatment where he died. Thereafter, he and other relatives made arrangements for transfer the body to Chiromo Mortuary in Nairobi. For the funeral and burial arrangements, PW1 states that the family incurred a cost of Kshs. 23,100/00.

**5.** He continued that the deceased was at his time of death aged 25 years and produced a certificate of death (**Exhibit P1 (b)**); that the deceased traded in shares on Kirinyaga Road Nairobi although no documentary evidence was tendered to that effect; that he had four dependants, thus, his wife parents and child who was aged 1 year at the time of his death; He added that the deceased used to make about Kshs. 20,000/00 out of his timber business and he produced bank statements ( **Exhibit P1 (i) and (j)**).

6. He testified that the vehicle that killed the deceased was motor vehicle registration number KAA 205 Z owned by the 1<sup>st</sup> Defendant and he produced a copy of records (**Exhibit P1 (h)**) to that effect.
7. On cross – examination, PW1 affirmed that the deceased died on 3<sup>rd</sup> June 1996. He admitted that the date of death in the grant (**Exhibit P2**) was wrong and explained that he had not noticed the defect earlier.
8. He agreed that he did not have any licence from Makueni Municipal Council and audited accounts for the deceased's said business. He maintained that the deceased had an income tax number, A001956957R but he had no income tax returns of the deceased in court.
9. PW2 testified that on the material day he was travelling in the suit motor vehicle with the deceased, when on reaching near Konza town, he heard a tyre burst. The driver then lost control and the vehicle crashed onto the left hand side of the road where the vehicle laid. Amongst the passengers who were injured was the deceased. He was taken to Machakos District Hospital for treatment where he passed on. He attributed the occurrence of the accident to the 2<sup>nd</sup> Defendant's careless driving by over speeding.
10. On cross- examination, he stated that the road was initially earthen but on reaching Emali on Mombasa – Nairobi highway the road was tarmacked. At the place where the accident occurred, there were small potholes. He admitted that he could not see the speedometer from where he was seated, but he could assess the vehicle's speed since he used the said motor vehicle every Monday.
11. He further admitted that his name did not appear among those who were injured but explained that it was so because, he did not report to the police having suffered minor injuries.
12. The 1<sup>st</sup> Defendant, DW1 testified that the accident occurred between an upcoming market called Malili and Kautandini trading centre and not near Konza as alleged, thus about 4 – 5 km from Konza junction. He stated that he learnt that all other passengers suffered minor injuries save for one who succumbed to the injuries. He met some of the passengers but denies meeting PW2. He did not find out who all the passengers in the suit motor vehicle were.
13. He said he learnt that the suit accident was caused by a tyre burst, but that the tyres were new since he had bought them a day prior to the occurrence of the accident. He said the said tyres were not re-treads. He finished by saying that the driver of the suit motor vehicle was never charged with any traffic offence in connection with the accident.
14. DW1 started by admitting that he was present in the court room when PW2 was testifying. He stated that he was on the material day travelling in the suit motor vehicle and before reaching Konza junction, he heard what sounded like a tyre burst. He later realised that the motor vehicle had crashed. He testified that the motor vehicle was not speeding and that it lost control after the tyre burst. He stated that the motor vehicle did not roll rather it merely lay on its side. He finally stated that he knew PW2 before the accident and that he did not see him in the accident.
15. On cross - examination, he affirmed that he knew PW2 before the accident since their home area is Nziu. He admitted that he knew many of the passengers but not all of them.
16. The undisputed facts are that the suit motor vehicle was at the material time owned by the 1<sup>st</sup> Defendant and driven by the 2<sup>nd</sup> Defendant under the 1<sup>st</sup> Defendant's authority; that the suit motor vehicle was involved in an accident on the material day as a result of a tyre burst; and that the deceased died as a result of the said accident.
17. The issues left for this court's determination therefore are:
  - (a) Whether the deceased death was caused by the Defendant's negligence; and
  - (b) If (a) above is answered in the affirmative, what is the damages payable to the Plaintiffs?

18. PW2 in his evidence stated that from his assessment, the suit motor vehicle was being driven at a high speed that it occasioned the tyre burst. DW2 on his part stated that the vehicle was not driven at a high speed rather it was after the tyre burst that the motor vehicle lost control.

19. Before analysing the point above, I should deal with the issue whether PW2 was in the accident or not. DW2 stated in his testimony that he knew PW2 before and that he did not see him in the accident. He indicated that he was seated behind.

20. I am of the view that by the fact that he was seated behind and in the commotion after the occurrence of the accident it was not quite easy for him to see everyone. PW2 clearly explained that he did not report to the police having only suffered minor injuries. If it is to be argued that PW2 did not tender any documentary evidence to support his allegation as to being present in the accident, then it must be noted that DW2 too did not tender such evidence. I am inclined to overlook the testimony of DW2 considering the fact that he was present in court at the time PW2 was giving his testimony. His evidence is considered wanting for the aforesaid fact.

21. The onus of proving inevitable accident, which is conceded in the case, is on the Defendant; I find that this onus was not discharged for the following reasons; first, because it was not proved that the burst preceded the accident instead of being a result of it, second, because even if the burst tyre was the cause of the accident, the Defendant failed to establish that even with proper inspection of the tyre, the tyre burst could not have been avoided.

22. I refer to an English decision of **The Schwan Vs. The Albano (1892) P.419 at page 429** in which inevitable accident is defined and to the decision of **Msuri Muhiddin Vs. Nazzor bin Seif [1960] E.A. 201** which concurred with the position therein.

**Lord Esher** in **The Schwan case** (supra) said:

**"What is the proper definition of inevitable accident? To my mind these cases shew clearly what is the proper definition of inevitable accident as distinguished from mere negligence - that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken between the case of inevitable accident and a mere want of reasonable care and skill."**

23. In the **Embu Public Road Services Vs. Riimi (1968) E.A 22**, **Sir Charles Newbold, P.**, after referring to the **Msuri case** said at page 25:

**"As I understand the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show, in the words of Sir Alistair Forbes, 'that there was a probable cause of the accident which does not connote negligence' or in the words which I have previously used 'that the explanation for the accident was consistent only with an absence of negligence'.**

24. It is undisputed that the cause of the accident was a burst tyre, and the question for determination is therefore whether the burst was due to the negligence of the defendant or more probably to an absence of negligence.

25. In the present case, the only thing known about this tyre is that after the accident the tyre was smashed. There is no evidence that it was examined before the accident.

The defendant, in order to avoid liability, must prove to the satisfaction of the court that they took all reasonable steps to ascertain that the tyre was fit for use on 3<sup>rd</sup> June, 1996 even though bought the previous day. The defendant has not discharged the burden of satisfying the court that he had taken all reasonable steps to avoid this accident.

26. The duty imposed on the owner of an omnibus must be higher. It emerged from the evidence on record that the road had potholes at the area where the accident occurred. This fact was unrebutted. The driver was therefore under duty to drive cautiously at this particular point. For the vehicle to have lost control after the tyre burst to an extent that the driver could not have avoided the accident is an indication that he must have been driving at a high speed.

27. May I also mention that with or without the production of the police abstract, there is evidence that the 2<sup>nd</sup> Defendant did not exercise due diligence while driving the suit motor vehicle.

In view of the foregoing, I find the 1<sup>st</sup> Defendant vicariously liable for the accident. Having said so, the next task is to assess damages.

28. Damages under the Fatal Accidents Act and Law Reforms Act are awardable under three heads, thus, for pain, suffering and loss of amenities and secondly, damages for loss of expectation of life and damages for loss of future income or lost years.

29. On the first head the cause of action survived the deceased. After the accident he was admitted in hospital. He underwent treatment but succumbed to intracranial haemorrhage due to injury of the brain and fracture of the left parietal region on the date of the accident. During his stay in hospital he must have suffered pain. For the pain and suffering he suffered, his estate is entitled to an award. The award suggested by Plaintiff is reasonable and bearing the authority by the Plaintiffs in mind, I assess damages on this head at Kshs. 70,000/00.

30. On the head of loss of expectation of life, awards are normally of a conventional figure. This court in **JAMES MUHORO NDUNGU AND ANOTHER VS WILSON NZIOKA MUTISO, NAIROBI HCCC No. 995 of 2001 (unreported)** awarded a sum of Kshs.70, 000/00. Bearing in mind the incident of inflation over the years and considering the fact that the deceased was young, and must have great expectations in life. I assess damages for loss of expectation of life at Kshs.100, 000/00. The total sum awarded herein under the **Law Reform Act** is Kshs.170, 000/00.

31. The last head is lost years. The deceased had a wife, a child and his parents who depended on him. He was aged 25 at the time of his death and was in good health. It was testified that he was making an average of Kshs.25, 000/00 per week from his timber business. There being no sufficient evidence as to the deceased's income, I shall use the minimum wage being Kshs.5, 054/00. I consider that most of his income was being spent on his dependants about 2/3.

32. As for the multiplier, there are several factors which affect it. The defence counsel suggested 16 years while the Plaintiffs' counsel suggested 45 years. The deceased was 25 years of age. I will adopt a multiplier of 20 years considering the vicissitudes of life.

33. Then there is the issue of special damages. Kshs. 23,100/00 was pleaded as having been incurred towards funeral expenses (Embalming and storage charges of the deceased's body, announcement at Kenya Broadcasting Corporation and Coffin) in addition Kshs.500/00 was pleaded for copy of records. I award the amount of Kshs. 23,100/00 which has been pleaded and proved.

34. The total, therefore, comes to:

- (a) General damages for pain, suffering and loss of amenities Kshs. 70,000/00
- (b) Loss of expectation of life Kshs.100,000/00
- (c) Lost years (5,054 x 20 x 12 x 2/3) Kshs. 808,640/00
- (d) Special damages Kshs. 23,100/00

Total Kshs.1, 001,740/00

35. As was held by the Court of Appeal in **KEMFRO AFRICA LTD Vs. A. M. LUBIA (1982-88) 1 KAR 727**, when the people entitled to the deceased's estate are the same persons for whose benefit the action under the Fatal Accidents Act is brought, the award for loss of expectation of life is deductible.

36. I will therefore subtract a sum of Kshs.100, 000/- from the aforesaid sum of Kshs.1, 001,740/00 leaving a balance of **Kshs.901, 740/00**.

Those will be the orders of the court.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 17<sup>th</sup> DAY OF OCTOBER,  
2012**

**H.P.G. WAWERU**

**JUDGE**