



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 29 of 2005

KAZOSI KALAMA

CHARO KALAMA NGUMAPLAINTIFFS

VERSUS

REA VIPINGO PLANTATION LIMITEDDEFENDANT

JUDGMENT

1. This is a claim for damages based on the tort of negligence and alleged breach of statutory duty. The suit arises from a Road Traffic Accident on the defendant's plantation which occurred on 15th February, 2003. It involved a motor vehicle KAN 736Y and a motor cycle, KAK 790Y the latter owned by the defendants and driven by its agent. One Karisa Charo Kalama an employee of the defendant who was a pillion passenger on the motor cycle suffered serious injuries. He died some nine months later. This action was brought by his wife Kazosi Kalama who together with the deceased's father Charo Kalama are the legal representatives of the estate of the deceased.

2. The action was brought in their own behalf (2nd plaintiff is since ceased) and on behalf of other dependants of the deceased, including his mother, children and siblings.

It was averred in the plaint that the accident occurred due to the negligence of the motor cycle driver. That subsequently the defendant breached its statutory duty under Section 12 of the Employment Act (now repealed) by failing to provide adequate medical treatment for the deceased thereby aggravating the condition of their injured employee resulting in his death on 15th November, 2003.

3. In the defence filed on 2nd June, 2005 the defendants denied all the material averments in the plaint and ultimately liability. It was pleaded in the alternative that the driver of the vehicle which collided with the motorcycle was to blame for the accident. During the hearing however, several undisputed issues emerged from the evidence of the parties. These include the basic facts of the case:

- a. The deceased was employed by the defendant as a tractor driver earning salary of shs. 4,037.90 per month.
- b. The deceased was injured in the Road Traffic Act accident on 15th February, 2003 and admitted to Kilifi District Hospital. The accident involved a third party's vehicle KAN 736Y and the defendant's motorcycle KAK 790Y.
- c. The driver of the defendant's motorcycle on which the deceased rode was subsequently charged with

causing death by dangerous driving, convicted and sentenced. The said driver was also an employee of the defendant.

- d. The deceased was admitted in Aga Khan Hospital between 21st February 2003 and 4th March, 2003 when he was moved to Coast General Hospital.
- e. The deceased remained at the Coast General Hospital until 6th June, 2003 and was discharged to go back home.
- f. The deceased returned to the accommodation provided by the employer and was visited and treated by a nurse or para-medical from the defendant's clinic.
- g. The arrangement went on for several weeks.
- h. Thereafter the condition of the deceased continued to deteriorate and on or about 24th October, 2003 the defendants arranged for his re-admission to the Coast General Hospital where he died on 15th November, 2003.
- i. The deceased was 34 years old at death and was survived by his widow, the 1st plaintiff, his father, the 2nd plaintiff (since deceased), and his mother and his four children namely;

Kahindi Karisa

Kadzo Karisa

Kazungu Karisa

Omari Karisa.

4. The main issues that require determination are whether the defendants are liable for the accident and breach of statutory duty and hence what damages are payable. On the first question, the evidence on record and the law stand in favor of the plaintiff. There is unassailable evidence through an eye witness to the accident Frederick Mutua Mumo (PW3) and the police officer Pc Njuguna (PW4) in that regard and while it is a well settled principle that the conviction on a traffic charge is not a bar to a claim for contribution by the person convicted, the claim must be supported by evidence. In the case before us the defendants took out a Third Party Notice against the owner of the accident vehicle KAN 736Y. The proceedings were seemingly abandoned and no evidence was led by the defendants to demonstrate that any other party apart from the motorcyclist was to blame for the accident. It is too late now for the defence to attempt to blame the deceased for alleged failure to wear protective clothing. No averments related to negligence on the part of the deceased had been made in the defence statement. From the evidence on record, the defendant's cyclist rode in a negligent manner by joining a main road from a minor road while the motor vehicle on the main road was approaching. The defendants are 100% liable for the accident.

5. On the question of the nature of injuries sustained by the deceased, the plaintiffs relied on the evidence of PW1 -4 none of whom were medical professionals. However, even the defence witness Mohamed Mokuu (DW1) admitted that the deceased sustained spinal injuries in the material accident. He stated during cross-examination that: "the deceased had more severe injuries (than the cyclist George) on the back. He complained of backache and could not walk until he died. I believe he had severe spinal injuries."

6. The photographs P.Exh.12 graphically show the injuries on the deceased about a month to his death. They are ghastly. Clearly his injuries were quite severe and had necessitated hospitalization for close to five months. It would have helped to receive the professional perspective of a doctor or pathologist on the exact nature of the injuries, but even with the evidence before us, there can be no doubt that the deceased sustained severe injuries to his lower body following the accident. The cause of death according to the

Death Certificate (Exh.7) was spinal injuries.

7. The defendant's counsel has submitted that there is no sufficient evidence of causation - i.e the accident to injury to death - in this case. Mr. Tindika for the plaintiff replied that there was only one accident hence causation is direct. I think it is necessary to take the evidence of all the witnesses as a whole. The picture that emerges from the refrom on this aspect is this: The deceased was a healthy man going about his activities until the accident on the morning of 15th February, 2003. Following injuries sustained he was treated at relatively adequate facilities namely, Aga Khan Hospital and Coast General Hospital. Despite being in hospital for about five months he did not fully recover, and eventually he died.

8. There is no evidence that there were intervening factors that exacerbated the condition of the deceased, beyond the allegations of the defence, and disputed by PW1, that she failed to take the deceased back for outpatient visits after discharge on 6th June, 2003 or used traditional medicine on the deceased. I think the facts in this case speak for themselves and notwithstanding the failure by the plaintiffs to call the pathologist, I am satisfied, on a balance of probabilities that the deceased succumbed to injuries he sustained in the accident on 15th November, 2003. The court cannot in the absence of evidence speculate, that as the defence suggests "*There could be other causes.*"

9. Before tackling the issue of damages, I find it appropriate to consider another related issue: Did the defendant breach its statutory duty to the deceased under the Employment Act (now repealed)?

Here it is necessary to reproduce paragraph 6, 7 and 8 of the plaint:

"6. The plaintiffs further aver that at all material times, the deceased was an employee of the defendant to whom the provisions of section 12 of the Employment Act, Chapter 226 Laws of Kenya, and the Employment (Medical Treatment) Rules, Rules 1 to 9 applied as the accident occurred while the deceased was in the course of his lawful duties with the defendant.

7. In breach of its aforesaid statutory duties and obligations to the deceased the defendant:-

(a) thereafter failed to provide and/or to ensure the provision to the deceased of proper medicines and medical attention after the deceased's accident aforesaid;

(b) failed to provide and/or to cause to be provided to the deceased proper medical treatment to the deceased.

(c) Failed and/or refused to furnish the necessary expenses and/or costs pursuant to the aforesaid accident for the deceased's medical treatment.

(d) Suddenly and maliciously caused the deceased's treatment to be stopped when he had not made sufficient recovery therefrom.

(e) Failed and/or refused to take the deceased back to the hospital on the appointed date directed by the doctor.

(f) Maliciously hid the deceased's medical records and cards which made it impossible for the plaintiffs and deceased's relatives to know the appointments with the doctors for further treatment.

8. By reason of the matters aforesaid, the deceased sustained very severe injuries which were grossly and/or utterly aggravated by the defendant's action as detailed in paragraphs 6, 7 and 12 herein as a result of which the deceased died 9 months later, to wit, on the 15th November, 2003."

10. Soon after the accident, the deceased was admitted to Kilifi hospital but transferred to Aga Khan Hospital on 21st February, 2003 where he remained under the care of one Dr. Parekh until 4th March, 2003. He was thereafter moved to the Coast General Hospital. He remained there until 6th June, 2003 when he was discharged. According to PW1 the deceased was doing well while undergoing treatment at

Aga Khan Hospital but not so at Coast General Hospital. It is the plaintiff's case that the defendants prevailed upon Dr. Parekh to discharge the deceased from Aga Khan Hospital to Coast General Hospital, a matter hotly disputed by DW1. The latter explained that the deceased required physiotherapy that was available at the Coast General Hospital. That may be a strange proposition considering the recency of the severe injuries sustained by the deceased. However, there is no evidence whatsoever that the transfer was forced upon Dr. Parekh by the defendant and/or that the quality of attention at the Coast General Hospital made the condition of the deceased much worse.

11. The deceased was admitted at the Coast General Hospital for four months receiving treatment. The defendant admittedly paid all the hospital charges. The plaintiffs did not provide any evidence to support the claim that the transfer to Coast General Hospital adversely affected the deceased's condition and the court would be making a quantum leap in logic to conclude so. After all, it is a fact of life that many ordinary people rely on government hospitals for treatment. Secondly, there is no expert evidence to compare the conditions/treatment of each hospital and its possible effect on the deceased's recovery. Again this is an issue that required professional medical evidence, which was not forthcoming.

12. During the trial allegations were traded by the parties as to who retained the medical records of the deceased. PW1 claimed that the defendant took all the treatment documents, a fact strenuously denied by DW1. The onus is on the person who alleges to bring proof. The plaintiffs could have called witnesses, including Dr. Parekh who played a key role in the treatment of the deceased at Aga Khan Hospital. They chose not to. Equally they also opted not to call any witness from Coast General Hospital, which is a public hospital, to shed light on the issues at hand. In the circumstances there is no basis for concluding that contrary to known medical practice the defendant engineered the discharge of the deceased from both Aga Khan Hospital and Coast General Hospital when he had not made sufficient recovery from his injuries.

13. It is true that the photos Exhibit 12 portray a very sick man but professional medical evidence could have shed light on his injuries soon after the accident, his condition at both hospitals and at the time of the photographs to enable comparisons to be made. It is admitted that after 6th June, 2003 the deceased was nursed by medical personnel from the defendant's clinic who visited him at home for a period of about a month. PW1 took issue with the adequacy of that treatment, but again she is a lay person and she is not able to explain the alleged deficiency of the treatment. In determining whether the deceased's condition rapidly deteriorated from the date of discharge to death in November, 2003, the court would have to know what the exact nature of his injuries were, whether the care he received was adequate and or whether his condition would still have taken a turn for the worse notwithstanding treatment. And it is not open to the court to make intelligent guesses on such a critical matter of evidence. In the absence of tangible evidence, the court must resist the temptation to draw conclusions on this question.

14. While I am prepared to accept that the deceased sustained severe injuries from which he died some nine months later, I am not persuaded on the evidence before me that the only possible cause that exacerbated his condition was the failure by the defendant to provide proper medical treatment for him. How about DW1's allegation that the relatives chose to use traditional remedies rather than attend conventional medical appointments? It had been alleged that the defendant "maliciously" hid the deceased's medical records which made it impossible to know the appointments for further treatment. As I indicated, the allegations concerning the medical records was not proved.

15. Besides if indeed the condition of the deceased grew worse due to the fact that the relatives did not know the appointment dates, that should not have been a bar to demanding that the defendants take the deceased to hospital, or even taking the action themselves. PW1 did not testify that he approached the defendant to help take the deceased to hospital after 6th June, 2003 and was rebuffed. It appears that instead the family sought the help of the media who highlighted the plight of the deceased. At that point the defendant swung into action to escort the deceased back to hospital. It cannot be that Section 12 of the Employment Act as intended to create a ward/guardian relationship between an employee and the employer. The deceased was an adult man with a family, which included his father and wife. Surely, they did not watch him die because taking him to hospital was the defendant's duty. Or is it possible they were relying on traditional treatments that failed? For the foregoing reasons, I am not persuaded that this is a

proper case for awarding aggravated damages: there is no basis for that.

16. On quantum, having considered the submissions of counsel I would award the conventional sum of shs. 100,000/- for loss of expectation of life. Under the pain and suffering head, it is not in dispute that the deceased suffered for nine months before death, following the Road Traffic Accident. Mr. Tindika for the plaintiffs urges an award of shs. 3Million. He relied on three authorities:

1. **Sanya Hassan & Anor v Somar Properties Ltd NRB HCCC 1517 of 2002** shs. 1,000,000 awarded as damages for pain and suffering over four months.

2. **Loise Wairimu Mwangi and Samuel Ndungu Muiruri vs Joseph Wambua Kamau (2006)e KLR** shs. 200,000/- awarded as damages for suffering over 43 days.

For their part, the defendants offer shs. 500,000/- relying on **Marietta Kalee Kaleli vs Mistry Muljinarean Construction Co. Ltd & Anor HCCC 66 of 1996 MSA**. In that case shs. 300,000/- was awarded as general damages for pain and suffering over eight months. The decision was given in 2000.

17. The deceased in this case must have been under great pain from the date of the accident to death. However I think the award of shs. 3Million as suggested by Mr. Tindika would be too high and without precedent. To this end I am fortified by the decision of the Court of Appeal in **John Maseno Ngala & Anor Vs Dan Nyanamba Omare (2006)e KLR**. The Court of Appeal recalled the advice of Potter JA, in **Rahima Tayab & Anor vs Anna Mary Kinanu (1987 – 88)1 KAR 90** in the following words:

“I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West(H) & Sons Ltd vs Hephherd (1964)A.C 326 at page 345:-

But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is award sums, which must be regarded as giving reasonable compensation

In the process there must be an endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Further-more, it is eminently desirable that as far as possible comparable injuries should be compensated by comparable awards. When all this is said, it still must be that amounts which are awarded are to a considerable extent conventional”

18. The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in **Lim Poh Choo vs Camden and Islington Area Health Authority [1979]1 ALLER 332 at 339:**

“In considering damages in personal injury cases, it is often said: “The defendants are wrong doers, so make them pay up in full. They do not deserve any consideration.

That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable... I may add, too, that if these sums get too large, we are in danger of injuring the body politic...As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and high fees for medical attention...”

In my considered view a sum of shs. 1.3million would be adequate as general damages for pain and suffering in this case. I award such amount under that head.

19. The deceased earned shs. 4037.90 at death as pleaded, and not the sum of shs. 5,552.00 which Mr.

Tindika argued ought to have been his legal salary by virtue of Legal Notice No. 86 of 2002. According to the set of payslips produced by PW1 the deceased's basic pay in November, 2003 was shs. 4037.90. He was 34 years old at death. The plaintiffs urge a multiplier of 20 years citing **Loise Wairimu's Case** where the deceased was 35 years old. The defendants relied on the case of **Florence M. Kiarie Vs AG and Anor HCCC 1930 of 1985 NRB** to argue for a multiplier of 16 years. The deceased herein was a tractor driver and barring life's vicissitudes could have worked well to the age of 55 years in the material period. A multiplier of 20 years as proposed by Mr. Tindika appears reasonable in the circumstances. Both counsel agree on a dependency ratio of 2/3 hence $4037.90 \times 20 \times 12 \times 2/3 = 646,064$.

20. The defendant's counsel Mr. Kinyua submitted that the court should deduct the award granted for loss of expectation of life as the plaintiffs are the same beneficiaries under the Law Reform Act and the Fatal Accidents Act. For this proposition he cited the case of **Kenfro Africa Ltd vs M. Lubia (1982-88)1 KAR 727**. In **Maina Kamau & Anor vs Josephat Muroki Kangondu & Anor CA No. 148 of 1989** the Court of Appeal observed that:

“The rights conferred by Section 2(5) of the Law Reform Act (Cap 26) Laws of Kenya, for the benefit of the estates of the deceased persons are stated to be in addition to and not in derogation of any rights conferred as the dependents of deceased persons by the Fatal accidents Act. This does not mean that damages can be recovered twice over, but if damages recovered under the Law Reform Act, devolve on the Dependents, the same must be taken into account in reduction of damages recoverable under the Fatal Accidents Act.”

The court's duty as I understand it from these decisions is to take into account damages awarded under the Law Reform Act and not necessarily to deduct the entire sum awarded thereunder.

21. The two decisions cannot be authority for the proposition that in every case, without exception, the court is duty bound to carry out with surgical precision the deduction of each and every penny awarded to the estate beneficiaries under the Law Reform Act, from the sums entitled to them under the Fatal Accidents Act. In my considered view the decisions emphasize caution against double compensation, leading to the grant of inordinately high and erroneous awards. The court must take into account all the relevant factors and not overreach itself while awarding damages (See also **Kemfro Africa Ltd t/a Meru Express Service & Anor vs A. M. Lubia and Anor (1982 – 88)1 KAR 727**)

22. In this case I would, considering that the Dependents will receive a lumpsum payment, have received a sum of shs. 36,264/- as death benefits of the deceased and are also beneficiaries under the Law Reforms Act round off damages under the Fatal Accidents Act to shs. 600,000/-.

Thus damages are awarded as follows:

Loss of expectation of life	shs. 100,000/=
pain and suffering	shs. 1.3million/=
Loss of Consortium	shs. 100,000/=
Loss of dependency	shs. 600,000/=
Total	shs. 2,100,000/=

The sum of shs. 600,000/= awarded under the Fatal Accidents Act will be apportioned equally among the widow, mother and children of the deceased, the only true Dependents of the deceased as follows;

1.	Kazosi Kalama	widow	shs. 100,000/=
2.	Dama Charo Kalama	mother	shs. 100,000/=

3. Kahindi Karisa Charo son shs. 100,000/=
4. Kadzo Karisa Charo daughter shs. 100,000/=
5. Kazungu Karisa Charo son shs. 100,000/=
6. Omar Karisa Charo son shs. 100,000/=

The portions in respect of beneficiaries No. 5 and 6 who on the face of it are still minors is to be invested into a reputable interest earning scheme for their benefit until they attain the age of majority.

Judgment is therefore entered for the 1st plaintiff against the defendants in the sum of shs. 2,100,000/= with costs and interest..

Delivered and signed at Malindi this **16th October, 2012** in the presence of Mr. Sitonik holding brief for Mr. Tindika for the plaintiff, Miss Muyaa holding brief for Mr. Kinyua for the Defendant.

Court clerk – Leah, Evans

C. W. Meoli
JUDGE

COURT

On application by Ms Muyaa and Mr. Sitonik not objecting there will be stay of execution for 45 days.

C. W. Meoli
JUDGE