



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Suit 47 of 2003**

**ALI EMOY ABDI NOOR** (suing as the legal representative of the estate of **ADAN ABDI NOOR-(DECEASED)**).....**PLAINTIFF**

**VERSUS**

**1. SIGMA FEEDS LIMITED**

**2. MICHAEL MULIMWOTO**.....**DEFENDANTS**

**JUDGMENT**

The Plaintiff is a nephew and the personal representative of the estate of the deceased, **Adan Abdi Noor** who died on 26<sup>th</sup> April 1999. He filed a plaint dated 31st July 2003 out of time after seeking and obtaining leave to do so from **Nyambuye, J** (as she then was) on 17<sup>th</sup> July, 2003. He claimed that on or about 26<sup>th</sup> April 1999, the deceased was lawfully standing along the Nairobi- Mombasa- Machakos junction at Kyumvi way off the road when the 2nd defendant, who was the driver thereof of motor vehicle registration number KAJ 607G which was owned and registered in the name of the 1st defendant, drove the said motor vehicle negligently causing the same to emerge into the main road without first ascertaining whether the road was clear and as a result collided with motor vehicle KAB 049X, the impact whereof caused the said motor vehicle to hit the deceased causing him fatal injuries. The particulars of negligence attributed to the 2<sup>nd</sup> defendant were that:

- a. “Driving at a speed which was too excessive in the circumstances**
- b. Failing to maintain any / or any proper and effective control of the said motor vehicle**
- c. Failing to stop, swerve, brake slow down or in any other way so to steer the said motor vehicle as to avoid colliding with motor vehicle registration number KAB 049X**
- d. Driving carelessly and dangerously without any due regard to the other traffic reasonably expected to be on the said road and especially motor vehicle registration number KAB 049X**
- e. Failing to slow down or stop at the T- Junction to ascertain that it was safe to enter the main road**
- f. Fully disregarding traffic rules and regulations as contained in the Highway Code**
- g. Driving carelessly and dangerously without any due regard to the other road users and especially the deceased.”**

The plaintiff also alleges that the 1<sup>st</sup> defendant is vicariously liable for the negligence of the 2<sup>nd</sup> defendant who was at all material times, his servant and/ or agent acting under his instructions and for its purposes. He therefore prayed for special damages amounting to Kshs 20,100/=, general damages as well as costs of the suit and interest. He pleaded that the deceased was aged 58 years at the time of his death and was employed by **A.A Kawir Transport** as a heavy commercial truck driver earning Kshs 80,000/= on average. By his death he lost his expectation of life and his estate has been put to loss and damage. As a result, the dependants of the deceased have suffered loss and damage having lost their means of livelihood and support. He also added that the 2<sup>nd</sup> defendant was charged and convicted of the traffic offence of causing death by dangerous driving in **Traffic Case No. 4 of 1999 at Machakos**.

The defendants were served but they failed to enter appearance within the prescribed time. The plaintiff therefore filed a request for interlocutory judgment dated 17<sup>th</sup> November 2003, which was entered on 23<sup>rd</sup> December 2003.

The defendants subsequently filed an application dated 24<sup>th</sup> June 2004 seeking to have the interlocutory judgment entered as aforesaid set aside. The application was heard and determined by the Honourable **R. V Wendo, J**, who set aside the judgment and granted the defendants leave to file their defence within 14 days. They duly did so vide a joint statement of defence dated 22<sup>nd</sup> February 2005. They denied the allegations that 1<sup>st</sup> defendant was the registered owner of motor vehicle registration number KAJ 607G or that the 2<sup>nd</sup> defendant was the driver thereof. They further denied that the negligence of the 2<sup>nd</sup> defendant if at all caused the demise of the deceased. In the alternative, they averred that the accident was occasioned by the negligence of one **Godfrey Witiki** of motor vehicle registration number KAB 049X. The particulars of negligence they attributed to him were:

- a. *“Driving at a speed which was excessive in the circumstances;*
- b. *Overtaking on a yellow line contrary to the Traffic Act and Highway Code;*
- c. *Driving too fast and recklessly;*
- d. *Failing to keep a proper look out;*
- e. *Failing to break swerve slow down or in any other manner to control the said motor vehicle so as to avoid the said accident;*
- f. *Causing the said accident and/ or death of the deceased by dangerous driving;*
- g. *Driving without due regard to other road users.”*

They further denied that the 2<sup>nd</sup> defendant was charged and convicted of the offence of causing death by dangerous driving.

The defendants later filed an application dated 19<sup>th</sup> April 2005 seeking leave to issue third party notice against **Gidraf Waitiki Kamau** and **Moses Thuku Mbugua**. The Honourable **D.A Onyancha, J** granted them leave and a Third Party Notice was issued. It is not clear from the record whether the defendants pursued the third party notice proceedings. Suffice to say that on 21<sup>st</sup> November 2006, the hearing of the case commenced before the Honourable **Onyancha, J** where the plaintiff testified. The honourable judge thereafter left the station and the matter later on came up for hearing before the Honourable **I. Lenaola J.** in unclear circumstances. The plaintiff successfully sought to have the matter start de novo. He testified that the deceased was his uncle who died along Mombasa- Nairobi at Kyumvi. He also stated that the deceased was not married. He was nonetheless a driver employed by the **A.A. Kawir Transport** and had worked for them for 15 years. On receiving the report about his death he went to the Machakos General hospital and confirmed that the deceased had passed on. He thereafter went to Machakos police station and filed a report. He was given a police abstract which he produced as exhibit 1 and was later issued

with a death certificate which he produced as exhibit 2. He explained that he filed the case late because the letters of administration were issued to him late. He produced the Order to file the case out of time as exhibit 3, the Letters of Administration as exhibit 4 and the certificate of search showing that the 1<sup>st</sup> defendant owned the subject motor vehicle as exhibit 5. He further produced a letter from the deceased's employers showing that he was earning Kshs 80,000/- inclusive of allowances, as exhibit 6. He further confirmed that the 2<sup>nd</sup> defendant was charged and convicted in traffic case number 4/1999 at Machakos and produced the judgment of the court as exhibit 7. He therefore prayed for the judgment as set out in the plaint.

On cross examination, the plaintiff stated that he did not intentionally delay to file the suit as the Letters of Administration were issued to him late.

PW2, **Rashid Ibrahim Sheikh** stated that he worked for **A.A Kawir Transport** as a manager and had worked thereat for 22 years. He testified that the deceased was their driver who drove commercial trailers. His salary amounted to Kshs 15,000/= per month. He however received allowances depending on where he travelled. The average salary and allowances amounted to Kshs 80,000/= per month. He further stated that the letter from his employer was written by **Juma Guleid** the man in charge of transport who was then in Dubai. On cross examination, he stated that the salary was not subjected to tax.

The other witness, PW3, **Mohammed Gabon Mohammed** stated that on the material day he was at Kyumbi area in the outskirts of Machakos. He was heading to Machakos and was at the matatu stage at the Machakos- Nairobi- Mombasa junction. He saw how the accident happened. The Lorry KAJ 607G Mercedes Benz was approaching the junction and instead of slowing down, it turned with speed towards Nairobi. A motor vehicle KAB O49 X was heading towards Mombasa and the Lorry hit it and as it tried to swerve, it hit three pedestrians. In his view, The Lorry caused the accident. On cross examination, he said that he did not testify in the criminal case.

After a hiatus of about 3 years, the case finally came before me, Learned counsels, **Mulu** for the plaintiff and **Mbone** for the defendants urged me to proceed with the case from where the **Honourable I. Lenaola, J** had reached. I acceded to their request. Since the plaintiff had closed his case, I heard the defence case.

**Mohammed Arif Khan** testified that on the 24<sup>th</sup> April 1999 he received instructions from Geminia Insurance Company Limited to investigate an accident which had occurred the previous evening involving a lorry registration number KAJ 607 G and three other vehicles registration numbers KAB 059X, KAX 084 V a canter and Lorry cum trailer KNT 218. The scene of the accident was at Kyumvi at the Mombasa - Machakos junction. The vehicles had been moved to the nearby Kyumvi police post where he examined them. He took the photographs of the vehicles. He further conducted extensive investigations at the scene of the accident. He stated that he found broken glasses but there were no break marks on the road. When he went to the hospital, he spoke to the injured persons and the deceased died in his presence. He presented his illustration to the court as to how he was able to reconstruct the scene. According to him Motor Vehicle KAJ 607 G was coming from Machakos side to join the Mombasa Nairobi Highway. Motor Vehicle KAK 084 V was parked off the road across Mombasa - Nairobi highway. 60 feet away from the matatu was the Lorry cum trailer registration number KNT 218. There were all parked facing Nairobi direction; the maize debri which was 60 feet away from the glass debri was from the lorry. The motor vehicle KAB O49 X was overtaking the lorry on the road headed to Mombasa direction. When the lorry driver from Machakos saw the motor vehicle KAB O49 X overtaking, he stopped in the middle of the road. As a result the motor vehicle KAB O49 X crushed into the lorry and following the impact, it hit the pedestrians who were off the road, one of whom was flung up and hit the windscreen of the trailer carrying maize. Prior to that, it had brushed the matatu. It proceeded to hit the area of the diesel tank of the maize trailer. Thereafter it cut right across the road went through the fence and stopped at a tree. He added that in his opinion, the damage between the motor vehicle KAB O49 X and motor vehicle KAJ 607 G could only have occurred with one vehicle at an angle and the other vehicle and the other one straight given the damage to the edges of the motor vehicle KAB O49 X body and front cabin rear side edge of motor vehicle KAJ 607 G. At the scene of the accident, there is a continuous yellow line. The motor vehicle KAB O49 X too must have been at a very high speed

given the distance covered and damage upon impact. The driver of the motor vehicle KAB O49 X was in the offside lane which would explain the motor vehicle KAJ 607 G's driver's explanation that motor vehicle KAB O49 X was overtaking and when he noticed it, he stopped in the middle of the road. Since there is no inward impact, he concluded that the motor vehicle KAJ 607 G was stationary as at the time of the accident.

On cross examination, he stated that his evidence was not imaginary. He did not find any vehicles at the scene and did not have particulars of the vehicles that were being overtaken by the canter. The driver of motor vehicle KAJ 607 G told him about the canter overtaking the other vehicles. He interviewed the people around on how the accident occurred. The driver of the canter explained to him how the accident occurred. He was taken to the scene by police officers whom he could not recall their names. He did not establish the distance between the motor vehicle KAJ 607 G and KAB O49 X. That marked the close of the defence case.

When the matter came before me on the 4<sup>th</sup> day of June 2012, the learned counsels agreed to put in written submissions. I have read the submissions alongside cited authorities filed by the advocates for the parties. I have also carefully read the evidence on record.

The issues of determination here are two fold, whether the defendants were solely liable for the subject accident which resulted in fatal injuries suffered by the deceased and if liable, the quantum thereof.

It is common ground that a life was lost due to the accident. The question which arises is whether it is the defendants herein that were negligent or is it the third party. The mere fact that the third party is the one who hit the deceased does not necessarily make him liable. The evidence on record shows that there indeed was a traffic case no. 4 of 1999 touching on the subject accident. The 2<sup>nd</sup> defendant was convicted of the offence of dangerous driving. The court fined him Kshs 5,000 for the said offence- **Sec 47A of the Evidence Act**, provides that:

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

The 2<sup>nd</sup> defendant upon being convicted of the traffic offence did not appeal, making the trial court judgment final. As such going by the above proviso, conviction of the 2<sup>nd</sup> defendant was prima facie evidence that he was negligent.

From the evidence of PW3 and that of DW1, the Motor Vehicle KAJ 607 G was coming from Machakos while Motor Vehicle KAB O49 X was on the main Nairobi – Mombasa highway heading towards the Mombasa direction.

PW3, was an eyewitness. He stated that on the material day he was at Kyumbi area in the outskirts of Machakos. He was heading to Machakos and was at the matatu stage at the Machakos- Nairobi- Mombasa junction. He saw how the accident happened. He explained to the court that, the Lorry KAJ 607G Mercedes Benz was approaching the junction from Machakos and instead of slowing down, it turned with speed towards Nairobi. At the same time, motor vehicle KAB O49 X was heading towards Mombasa direction from Nairobi and the said Lorry hit it. It tried to swerve and in the process, it hit three pedestrians.

DW1 on the other hand, in his expert opinion deduced that KAB O49 X was to blame for the accident. Firstly, he was overtaking on the off-side lane, secondly, there was a continuous yellow line which according to the law forbade him from overtaking, but he did overtake other motor vehicles anyway and finally, he was driving at an excessive speed hence the impact that resulted in the fatal injury.

I have considered the evidence of PW3 as against that of DW1. PW3 was at the scene of the accident. He

witnessed 1<sup>st</sup> hand the accident as it occurred. DW1 on the other hand, was not at the scene of the accident. He however, gave his evidence as an expert witness, which evidence is purely hearsay and as such, it is of little evidential value. I am inclined therefore to rely heavily on the evidence tendered by PW3 seeing that he was at the scene of the accident and was able to observe the accident as it unfolded.

In consideration of the foregoing, the 2<sup>nd</sup> defendant driving Motor vehicle KAJ 607 G, on approaching the said junction according to the Traffic Act, ought to have slowed down and ensured that the road was clear before he entered the highway. This was however not the case according to the evidence on record. Going with the evidence of DW1, the 1<sup>st</sup> third party driver driving motor vehicle KAB O49 X was allegedly overtaking on the off-side lane and was driving at an excessive speed. If that was the case, then he was also in breach of the traffic rules, however, had the 2<sup>nd</sup> defendant stopped before joining the main highway, then the accident would not have occurred and no fatal injuries would have resulted. Given the evidence of PW3 who was an independent witness and the fact that as a result of the accident, the 2<sup>nd</sup> defendant was subsequently tried and convicted of the traffic offence of careless driving, the liability of the defendants for the accident cannot be in doubt. However, I do not think that they are solely to blame. The other vehicle was to blame to some degree. I will therefore apportion liability at 80% as against the defendants and 20% against KAB O49 X.

I wish now to address myself to the claim by the defendant that the suit is time barred. The plaintiff was granted leave to file the suit out of time by **R. Nambuye, J** on 17<sup>th</sup> July 2003. The plaintiff stated that he was unable to acquire the letters of administration on time due to delay occasioned by the lawyer he had instructed at that time one, **Kavila Advocate**. I have considered the case of **Divecon Ltd vs Samani Mbithi Case No. 142 of 1997** where the Court of Appeal at Nairobi held that:

***“Under sec 28 (2) of the Limitation of Actions Act, where an ex-parte application for the extension of time was made before the commencement of an action, leave would only be granted where a cause of action had been established and the requirements of sections 27 (2) and (29) had been fulfilled. Sections 27 (2) and (29) provided that where the period of limitation had lapsed, it had to be proved that material facts relating to the cause of action were or included facts of a decisive nature which were at all times until his death outside the knowledge of the deceased and not the respondent.”***

On the same footing, the honourable judges also held;

***“That a judge could in a trial consider and accept or reject the ex parte order granted by another judge for extension of time under the limitations of Actions Act.”***

Having considered sections 27, 28, 29 and 30 of the Limitations of Actions Act, I am satisfied that **Nambuye, J** exercised her discretion properly. There is therefore no need to set it aside. Further, I would refer the defendants to Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. The rights of the plaintiff shall not be prejudiced due to the mistakes of his advocates.

Still on the issue of liability, the defendants in their submissions referred this court to findings in a number of other suits which were filed as result of the accident determined by various subordinate courts. These decisions were however not tendered in evidence in this court. In any case, this court is not bound by these decisions since they emanate from the subordinate courts.

In summary, my conclusion on liability is that the evidence tendered by the plaintiff is uncontroverted and taking into account the evidence of PW3 and the **Traffic Case No. 4 of 1999 at Machakos**, the 2<sup>nd</sup> defendant was negligent and is substantively to blame for the accident. The defendants called DW1 an expert witness who attempted to shift liability toward a 3<sup>rd</sup> party vehicle; nonetheless he failed to convince this court that the 3<sup>rd</sup> party was fully to blame. In any event, the alleged 3<sup>rd</sup> party was not enjoined in these proceedings. Had they been enjoined, then they would have borne 20% of the liability. I therefore hold that the defendants are 80% liable for the accident.

On quantum, the plaintiff has asked the claim to be assessed under the following heads, special damages, loss of dependency, loss of expectation of life and pain and suffering. With regard to special damages, I note that a total of Kshs 20,100/- has been pleaded but no receipts or other documentary evidence was adduced in proof thereof. Special damages must be specifically pleaded and proved. This was not done and I disallow the claim.

On the pain and suffering, the deceased was injured on 26<sup>th</sup> April 1999. He was in hospital until 27<sup>th</sup> April 1999 when he died, as per the death certificate produced as exhibit 2. The plaintiff has quoted the case of **Joyce Mumbi Mugi vs co-operative Bank and two others C.A No. 214 of 2004 (Nyeri)**, where the deceased died one day after the accident and her estate was awarded Kshs 300,000/= The defendants on the other hand has relied on the case of **James Muhoro Ndungu and Another vs Wilson Nzioka Mutiso HCC NO. 995 OF 2001** Nairobi (unreported) where the plaintiff was awarded Kshs 60,000/- for pain and suffering. The deceased must have agonized in pain, I would award a modest figure of Kshs 150,000/=.

On the loss of expectation of life, a conventional sum of Kshs 100,000/- is normally allowed. I will award the same.

In regard to loss of dependency, the plaintiff claimed that he and his father depended on the deceased. The defendant argued that there was no proof that the deceased supported the plaintiff. I am of the opinion that failure by the plaintiff to adduce evidence to support his claim does not necessarily negate that claim. It is agreed that the deceased earned Kshs 80,000/- on average and he was aged 58 years. This was taken home as the same was not subjected to taxation as was stated by PW2. This was an offence. At first I was inclined not to treat him as someone who was not employed in the absence of tax returns. However, the misgivings notwithstanding, there is no doubt that he was in employment and that he earned a basic salary amounting of Kshs 15,000/=. I will use that as the multiplier. I will not consider the allowances since he was given the same only when he was going on a trip.

I further wish to address the fact that the deceased worked for a private sector and as such I am refrained from using a retirement age of 55 years that was applicable then. Though the deceased was approaching his sunset years, I think he would have worked upto about 65 years barring any mishap and or other imponderables of life. In the premises, I would adopt a multiplier of seven (7) years and multiplicand of Kshs 15,000/=.

In the event, the award under his head shall be-

$$15,000 \times 7 \times 12 \times 2/3 = 840,000/=$$

To avoid double compensation, I will knock off the award of Kshs 100,000/= being loss of expectation of life.

I shall therefore enter judgment as follows:

a. Loss of Dependency	Kshs 840,000/=
less	<u>Kshs 100,000/=</u>
	Kshs 740,000/=
b. Pain and Suffering	<u>Kshs 150,000/=</u>
	<u>Kshs 890,000/=</u>

The defendants shall jointly and severally pay 80% of the judgment sum aforesaid to the plaintiff plus costs and interest.

**DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>th</sup> OCTOBER, 2012.**

**ASIKE- MAKHANDIA**

**JUDGE**