REPUBLIC OF KENYA

High Court at Machakos

Civil Case 211 of 2000

NELSON NDAWA KIOKO.....1ST PLAINTIFF

PRISCILLA NYAANYI KIOKO(suing for and on behalf of the estate of JANE SYOVATA KIOKO (DECEASED).....2ND PLAINTFF

VERSUS

MOMBASA LINERS.....DEFENDANT

AND

M.D PATEL CO. LIMITED.....3RD PARTY

JUDGMENT

Vide an amended plaint dated 31st July, 2002 and filed in court on 5th August, 2002, the plaintiffs suing as the legal representatives of the estate of **Jane Syovata Kioko**-deceased sought against the defendant and the 3rd party:-

v Special damages in the sum of Ksh. 15,150/=

v General damages under the Fatal Accidents Act

v General damages under the Law Reform Act

v Costs of the suit, and

vInterest on the above at court rates.

The suit arose out of an alleged road traffic accident involving the deceased and the motor vehicles belonging to the defendant and the third party. Apparently, the deceased was on 27th September, 1999 lawfully travelling in motor vehicle registration number KAG 066P belonging to the defendant along the Nairobi –Mombasa road, when at Kapiti plains, the defendant's driver, servant and or agent drove, controlled and or managed the said motor vehicle so negligently that he permitted the same to loose

control and collide with motor vehicle registration number KAJ 588X belonging to the third party. However, it is instructive that the third party was joined in these proceedings by the defendant.

As expected the defendant denied all allegations of the plaintiffs and put them to strict proof thereof. It attributed the accident solely to the third party whom it later brought on board.

The hearing subsequently commenced before **Nambuye, J** (*as she then was)* on 29th May, 2003. The plaintiffs' first witness was **Jacob Otieno Odhiambo,** a computer designer. He was travelling on the material night in the same bus with the deceased. On 27th September, 1999 he had left Mombasa for Nairobi He had talked to the deceased briefly before they boarded the ill fated bus. When the bus left Mombasa some minutes past 10.00p.m, it was being driven very fast. On approaching Kapiti Plains at about 4am, there was an oncoming lorry from Nairobi direction which was also speeding. The defendant's driver panicked and tried to avoid the accident but was unsuccessful. He veered a little bit to the right as the lorry was in the middle of the road. It was carrying sand. In the process of veering off the road, the 2 vehicles collided. Accordingly to this witness, drivers of the 2 vehicles were equally to blame for the accident. He however blamed the defendant's driver more for the accident because of his over speeding. It had taken him 6 hours to be in Nairobi. If he had been driving carefully the accident would have been avoided. The bus fell on the right hand side of the road as one faces Nairobi direction. The lorry remained in the middle of the road. He later learned that the deceased had passed on at the accident.

Cross-examined by **Mr.Mahugu,** learned counsel for the defendant, the witness confirmed that he never reported the accident to the police, nor did he have a receipt to show that he had travelled on the bus. At Kapiti plains the road is straight. The lorry was in the middle of the road but more on the left side of the bus. The driver of the bus was not in a position to avoid the accident because he was over speeding.

Cross-examined by **Mr. Nyakeri**, learned counsel for the 3rd party, he stated that he was in the bus and sat on seat No.6. He was receipted as **David** though his name was **Jacob Otieno Odhiambo.** Though the accident occurred at 4am he was very wide awake and saw everything that happened. He denied seeing a giraffe which was trying to cross the road at the scene. The lorry was however, in the middle of the road, despite the collision, the lorry was not damaged at all.

When the case, next came up for hearing on 2nd March, 2005, **Nambuye, J** had left the station presumably on transfer. The hearing of suit was then taken over by **Wendoh,J Nelson Ndawa Kioko**, the 1st plaintiff and father of the deceased testified that on 25th September, 1999 ,the deceased asked him for permission to travel to Mombasa to visit a friend. He granted her the wish. On 26th September, 1999 she called him and informed him that she was travelling back to Nairobi by bus that very evening. However, he received a report of an accident involving his daughter on 27th September, 1999. He went to Machakos Police Station and he was informed that his daughter had passed on in the accident. He was issued with a police abstract. He subsequently applied for a Grant of Letters of Administration with regard to her estate. The deceased was aged 31 years at the time of the accident. She was an administrator at Hampstead Enterprises earning a salary of Kshs. 38,067/= net. The family used to depend on her. She would pay their rent at California Estate of Kshs. 5,000/=, pay employees at home Kshs. 4000/= monthly, paid school fees for her 2 siblings**, Daniel Mutua Kioko** and **Edna Ndinda Kioko**. In total she used to spend Kshs. 25,000/= on account of family expenditure. That assistance is no more. He used to have a shop selling tyres in Nairobi. He was unable to sustain himself and pay all the expenses. He ended up closing the shop.

Before the commencement of cross-examination, parties consented to special damages to the tune of Kshs. 69,836/=. Under cross-examination by counsel for the 3rd party, he stated that he was then aged 66 and his wife, the 2nd plaintiff was aged 55 years. His youngest son was born in 1984. The 1st and 2nd born were deceased. The 3rd born worked as a tea girl whereas the last born was unemployed. He had no evidence to show that the deceased used to meet his expenses.

P.C (w) Nancy Chepkorir, testified as PW3 on behalf of the plaintiffs. She came to testify with regard to the police file about the accident. According to the file, the accident involved the defendant's and third

party vehicles as well as a giraffe. She confirmed that among the dead was the deceased. She died on the scene. Apparently, the defendants' driver on reaching Kapiti Plains knocked a giraffe which was crossing the road from the right to left as one faces Nairobi direction. The driver upon hitting the giraffe lost control and went and collided with the 3rd party vehicle that was being driven from Nairobi direction towards Mombasa. The bus then rolled and landed on its left side facing Nairobi direction. 6 passengers died on the spot while the injured were taken to various hospitals in Machakos and Nairobi. Upon compiling the file, it was forwarded to the State counsel who recommended that the defendant's driver be charged with causing death by dangerous driving contrary to section 46 of the Traffic Act. By the time she was testifying the driver had yet to be arrested and charged.

Cross examined by counsel for the 3rd party, she confirmed that the accident involved a bus, giraffe and a lorry. The giraffe emerged from the right side to the left as one faces Nairobi. The bus landed on the left side as one faces Nairobi.

Next witness called by the plaintiffs was **Erick Kiptanui Maibei.** He was the operations manager with Hampstead Enterprises, the employers of the deceased. He confirmed that the deceased worked with them as an Assistant Administrative Manager in charge of petty cash. She had been employed on 31st August, 1998. By the time she passed on, she was till their employee. She earned a gross salary of Kshs. 79,067. However after taxation her net monthly income stood at Kshs 66,000/=. When the witness sought to introduce the letter of appointment, counsel for the defendant and third party respectively objected. The objection was sustained by court. This compelled counsel for the plaintiffs to stand down the witness. It would appear that thereafter the proceedings were adjourned *sine die* for it was not until 9th May, 2012 that they were revived before me. Before then, the case had gone through the hands of **Onyancha, Lenaola** and **Waweru, JJJ** without much headway.

When the case came before me as aforesaid, parties agreed that I should proceed with it from where **Wendoh,J** had left. PW4 who had earlier on been stepped down could not be availed as he was suffering from throat cancer. Accordingly, PW5, **Samwel Saino** took the stand on his behalf. He tendered in evidence the letter of appointment and pay slip of the deceased as exhibits.

Cross–examined by the 3rd party, he confirmed that though the letter of appointment had no physical address, nonetheless the company was located in Westlands. He also confirmed that the deceased had been in their employment from 21st August, 1998 to 27th September, 1999. The letter of employment was genuine. With that the plaintiff closed their case.

In defense, the 3rd party called its driver. He testified that on 27th September, 1999 he left Nairobi for Emali to ferry sand. He was accompanied by 2 turn boys. He reached Kapiti Plains at about 5a.m. when he saw an oncoming bus, about 500 meters away. The bus suddenly swung into his path. He applied brakes and veered off the road and stopped. The oncoming bus crossed the road on to his side, crashed into his lorry and landed about 100 meters away. He left the lorry to attend to the occupants in the bus. He managed to switch of the engine of the bus and the driver attributed the accident to the giraffe. Apparently, he had hit the giraffe, lost control and crushed in his lorry. He later saw a dead giraffe on the road about 150meteres away. The bus appeared to have been driven at an excessive speed. Otherwise the driver would have seen the giraffe in good time and avoided it. In the premises the accident was solely caused by the driver of the bus.

Cross-examined by **Makau,** learned counsel for the plaintiff, he reiterated that the accident happened at about 5am. The bus was over-speeding. It collided into the lorry off the road. The accident was thus caused solely by the driver of the bus. That then marked the close of the defense case.

Parties then agreed to file and exchange written submissions. This was subsequently done. It was however only between the plaintiff and 3rd party. For unexplained reasons, the defendant at some point in the proceedings opted out.

The foregoing notwithstanding I have carefully read and considered the written submissions and cited

authorities.

The issues for determination in this suit are twofold; liability and quantum if at all. Dealing with 1st issue, it is the duty of this court to determine which of the drivers were responsible for the accident or whether or not both of them are responsible and to what extent. To my mind, this is a very simple issue to determine. Initially the plaintiffs had only sued the defendant for damages and not the 3rd party. The 3rd party was brought into the suit by the defendant. It was the burden of the defendant to prove that the 3rd party solely or substantiality contributed to the accident. That would then have enabled the court to determine whether the defendant would be entitled to indemnity and or contribution from the 3rd party. In other words, the plaintiffs cannot hold the 3rd party directly responsible for the accident. They can only do so through the defendant. Indeed the liability can only attach on the defendant who in turn would then seek indemnity and contribution from the 3rd party. That is the essence of 3rd party proceedings.

The record shows that the defendant initially attended the proceedings but along the way, it fell by the wayside. Indeed it never tendered any evidence to show that the 3rd party was in any way to blame for the accident. Accordingly, in the absence of such evidence, the 3rd party cannot be held liable. In any event, from the evidence of the 3rd party's driver, there is no way he could have been held responsible for the accident. He was categorical that it was the defendant's driver who was responsible. His evidence was not at all challenged by the defendant or the plaintiffs. The defendant's driver was over-speeding, hit a giraffe which was crossing the road, lost control, came in to his path, collided with his lorry and landed 100 metres away. This evidence was buttressed by that of PW3, **P.C Nancy Chepkorir** who produced the police abstract and police records. The records of the police corroborated the evidence of the 3rd party driver and blamed the driver of the defendant for the accident. Indeed the police had recommended that the said driver be charged with the offence of causing death by dangerous driving.

The only other witness who witnessed the accident was PW1, **Jacob Otieno Odhiambo**. To the Plaintiffs this was an independent witness and victim of the accident as well. In my view however, his evidence needs to be taken with caution and circumspection. Though he claimed to have been a passenger in the bus, he travelled as a **Mr. David.** That was not his name. Though he claimed that the name belonged to his friend, the alleged friend was not called as a witness to confirm the allegation. Further, he denied that the giraffe was involved in the accident when PW3 and DW1 confirmed such an occurrence. Indeed the dead giraffe was at the scene of the accident for all and sundry to see. If the witness can lie on such an obvious fact, what else has he lied on? I would in the premises agree with the view of counsel for the 3rd party that the submissions made about the lorry that it was to blame for the accident is based on the fact that the defendant was insured by United Insurance Company which is under liquidation while the 3rd party was insured by Kenindia Assurance Co. Ltd which is still in business.

On the whole, I think that the party to blame for the accident was the defendant who should be held 100% to blame. The evidence established that the defendant's driver drove the bus at a very high speed. PW1 admitted that much. They had left Mombasa slightly after 10.00p.m and he was surprised that by 4.00 a.m they were approaching Nairobi. Because of over-speeding and without keeping proper look out, he knocked a giraffe in the middle of the road, lost control and went over to the side that the 3rd party's lorry was being driven and collided with the right side of the lorry. This being the scenario isn't obvious as to who was at fault. Although PW1 attempted to show that the accident took place on the tarmac and in the middle of the road, that evidence should be disregarded as it is in contradiction with that of PW3 nor is it inconsonance as to what obtained at the scene of the accident. There was the dead giraffe and the bus came to rest off the road on the same side as the lorry. In the result, I hold the defendant 100% liable for the accident.

As regards quantum, the plaintiffs are entitled to damages under the following heads:-

v Loss of dependency

v Loss of expectation of life

v Pain and suffering

v Special damages

With regard to loss of dependency, it is common ground that the deceased was employed by Hampstead Limited as an Assistant Administrative Manager in-charge of salaries. She was earning a basic salary of Kshs. 66,522/=. She was not married and had no children except the parents, sisters and brothers. At time of her death she was aged 31 years. On this account the 3rd party proposes a multiplier of 10 years and dependency ratio of ½ whereas the plaintiffs have suggested a multiplier of 25 years and the same dependency ratio. The deceased was engaged in a private sector. She may therefore have worked upto the ripe age of 60 years or above. However, it is also possible that she could not have worked that long considering the idiosyncrasies of life. One is never sure of life. In any event the parents of the deceased were aged and the youngest sibling was aged 19 years. The dependants would not have depended on the deceased until the deceased reached the 60 years mark. In the premises, I would settle for the multiplier of 18 years. Therefore dependency works out as follows:-

Kshs. 66,552/= x ½ x 12 x 18= 7,187,616/=

As for loss of expectation of life, normally a conventional figure of Kshs. 100,000/= is given. I will allow that figure. However, the plaintiffs cannot get double compensation and this sum should be deducted from the award under loss of dependency.

On pain and suffering, though the deceased died on the same day of the accident, her death was never the less instant. She must have undergone excruciating pain before she finally passed on. The plaintiffs have suggested an award of Kshs. 100,000/= whereas the 3rd party had proposed Kshs. 10,000/=. I will allow Kshs. 100,000/=.

Special damages are agreed at Kshs. 15,150/=

In the final analysis, judgment be and is hereby entered against the defendant and in favour of the plaintiffs in the sum of Kshs. **7,302,766/=** Made up as hereunder:-

v Loss of dependency	Kshs.	7,187,616.00
v Pain and suffering	”	100,000.00
v Special damages	”	15,150.00
Total		7,302,766.00

The plaintiffs shall also have costs of the suit as well as interest. Interest on special damages shall accrue from the date of filing suit whereas from the date of this judgment with regard to general damages.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **14TH day** of **DECEMBER, 2012.**

GEORGE DULU
JUDGE