



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 487 OF 2000

GEORGE WANG'ANG'A (*Legal Administrator of the Estate of the late MAUREEN WANJIRU WANG'ANG'A (Deceased)*).....PLAINTIFF

VERSUS

AUGUSTINE MWANGALE KHAEMBA.....1ST
 DEFENDANT

AKAMBA BUS SERVICES LTD.....2ND
 DEFENDANT

AND

MARTIN WAWERU MUKURIA.....1ST THIRD
 PARTY

STEPHEN M. MWAI.....2ND THIRD
 PARTY

JUDGMENT

The Plaintiff sued the Defendants in a Plaint dated 13th November, 2000 and filed on 14th November 2000 for -

(a) Special damages,

(b) General damages under both the Fatal Accidents and Law Reform Act.

The Plaintiff's case against 1st Defendant was for negligent driving which caused the death of the minor, Maureen Wanjiru Wang'ang'a (*the deceased*), and the 2nd Defendant vicariously liable as the employer of the 1st Defendant.

The Plaintiff's case was that on or about 26th day of December 1997, the deceased minor was lawfully travelling in motor vehicle KUK 544 along Naivasha-Nairobi road when on reaching an area called Fly-Over, 1st Defendant so negligently drove, controlled and managed the 2nd Defendant's motor vehicle registration number KZW 478 aforesaid causing it to so violently collide with motor vehicle KUK 544 and the impact of which the deceased sustained fatal injuries from which she died.

In their Amended Defence, the Defendants denied any of the claims of negligence on the part of the 1st Defendant and laid out a counter-claim against the driver of motor vehicle KUK 544, one Martin Waweru Mukuria who drove the vehicle as agent of one Steven M. Mwai, the owner of motor vehicle KUK 544.

In the event, the Defendants took out Third Party Notice, and the said MARTIN WAWERU was joined as a Third Party. In a Defence dated 28th November 2002, the Third Party (*Martin Waweru*) denied any negligence on his part and pleaded negligence on the part of the 1st Defendant, for which the 2nd Defendant was vicariously liable, and set out in paragraph 3 of the Third Party's Statement of Defence, the usual particulars of negligence - failing to exercise the duty of care owed to other motorists and in particular the deceased, and causing the death of the deceased.

To prove his claims, the Plaintiff called three witnesses, PW1 was the father of the deceased and the legal administrator of her estate. His daughter was travelling in the ill-fated Nissan Pick-up KUK 544, while on her way to Musa Gitau Secondary School where she was to join Form II, and that her ambition was to become a lawyer upon completion of her studies. He produced exhibits 1 to 6, including a copy of a charge sheet against the 1st Defendant and proceedings in Naivasha S.R.M. Traffic Case No. 10 of 2000 in which the 1st Defendant was charged with, and acquitted of the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act, (*Cap. 403, Laws of Kenya*), on the ground that the charge was duplex.

PW2 was a passenger in the 2nd Defendant's motor vehicle, Registration Number KZW 478 a Nissan Bus. His evidence was that the Bus came late from its departure time, of about 8.00 p.m., and did not leave Nairobi until 10.30 p.m., enroute to Kisumu. In order perhaps, catch time, PW2 testified that the 1st Defendant drove at high speed, and had, by the time of reaching the place called "Fly-Over" on the Nairobi-Naivasha-Nakuru Road, lost control of the bus, and it was zig-zagging on the road, from left to right, and from right to left, and to right again, and by the time of the impact, it was slightly over the lane to the right facing Naivasha. The bus driver did not keep his side of the road, and suddenly swerved to the right side of the road, the lane of the on-coming vehicle and thus causing the vehicle to collide.

PW3 was P.C. Francis Mwangi from Naivasha Traffic Police Base. He testified from institutional memory as he himself did not investigate accident. He produced the Police Abstract Report, and testified that according to their findings the Bus driver was solely to blame for the accident; and the driver was charged, but was acquitted on a technicality of the charge. This witness also testified on the confusion introduced into the matter by the Office of the Attorney-General and C.I.D. insisting on withdrawal of the charges against the 1st Defendant, and that the Third Party be charged. In the end as noted, the 1st Defendant was acquitted on a technicality of duplicity of charge.

In their defence, the Defendant called its Manager Nakuru to testify. DW1 testified that the 1st Defendant was no longer in the employment of the 2nd Defendant and had retired to his rural home in Western Kenya where he could not be traced. After much opposition, I allowed him to produce a copy of the proceedings in Naivasha SPM Traffic Case No. 10 of 2008 (*Republic vs. Augustine Mwangale Khaemba*).

The Defendants placed much emphasis on those proceedings, and it is worthwhile to briefly set out the evidence recorded in those proceedings.

According to PW2 (*Martin Mukuria Waweru*), the driver of the Datsun Pick Up KUK 544, he saw a vehicle coming to his side of the road, it hit him, and he lost control. One of his passengers, a lady died. He sustained injuries in the neck, mouth and legs. He denied that he was either drunk or had bottles of whisky in his pick-up. He denied overtaking any other vehicle. He was driving at 50-60 KPH.

PW3 (*in the Traffic Case*) testified that he never saw any beer bottles in the Pick Up. He was seated on the driver's line, and could see in front. He was not asleep. He noticed the vehicle was moving in a zig zag manner. He saw the on-coming vehicle, suddenly he heard a bang, and knew there had been an accident and that the accident occurred slightly on the right side of the road as you face Naivasha. The Bus was moving on both lanes.

PW7 (*in the Traffic Case*) also testified in cross-examination that there were no beer bottles in the Pick-Up, and none of the people in the Pick-Up smelled alcohol. He was of the view that the driver of

the bus was to blame and he had recommended that none should be charged as the accident happened in the middle of the road, and that only one witness saw the accident - the part of the bus was on the right of the road as you face Naivasha, and according to this witness there was not enough evidence to charge the 1st Defendant.

He confirmed the testimony of the Bus driver (*in the Traffic*), that he left Nairobi at 9.40 p.m., and he was driving at 60-70 KPH. He testified that about 11.30 p.m. before approaching Fly-Over - he saw lights flashing in front of him in a zigzag way, that the vehicle was on his side, and that he tried to avoid to no avail, and that he heard bang on his right hand side which hit his right tyre and punctured it. He further testified that upon opening his door, he found two bodies on the ground and two bodies on the wreckage. A Nissan matatu took the injured to hospital. The driver testified that the accident occurred on his side of the road. He also testified that the bus was fitted with a speed governor, and that the maximum speed was 80 KPH and going uphill he could not over speed.

This driver had been on duty the previous night.

THE ISSUE AND ANALYSIS OF EVIDENCE

The issue in a running down case invariably is who was the negligent party and therefore owed the other some duty of care.

According to Pollock, **The Law of Torts (1887)**. "In strict legal analysis, negligence means more than heedless or careless conduct, whether omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed "per Lord Wright in **LOCHGELLY/ROW & COAL VS. M'MULLAN [1934] AC.1.**

The tort of negligence is the breach of a legal duty to take care, resulting in damage to claimant which was not desired by the Defendant. As it was put in the case of **BLYTH VS. BIRMINGHAM WATERWORKS CO. (1856)11 Ex. 781,**

"it is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

In all this, the burden of proof is generally upon the claimant.

I have already set out the plaintiffs' claim, as the claimant. He lost his daughter Maureen Wanjiru. She was a passenger in the ill fated Pick-Up. She was the only one who died. The evidence of the Plaintiff's witnesses was that the Akamba Bus left Nairobi well after its usual departure, according to PW3, about 10.00 p.m. and according to the 1st Defendant's case in the Traffic Case in Naivasha, he left Nairobi at 9.40 p.m. That would be consistent with the evidence of PW3 who said the departure time was 10.00 p.m.

According to the 1st Defendant's evidence in the Traffic Case he got to the area of Fly Over at about 11.30, an area he put to be 25 km to Naivasha Town. He had been driving for over 1¹/₂ hours, when he met the ill-fated Pick-Up, in which the deceased was a passenger. The Pick Up flashed at him, he swerved from left to right, and again to left, but not far enough to avoid a head-collision with the pick-up.

According to the evidence of the Base Commander before the Traffic Court in Naivasha, he found the bus on the right side of the road as one faces Naivasha. According to the Traffic Rules, every driver is required to drive to his left side, (*nearside*), what was the 1st Defendant doing on his right (*offside*) of the road? This lends credence to the evidence of PW3 that the driver was driving very fast and in a zig-zag manner.

Murimi, learned counsel for the 2nd Defendant cast doubts on the ability of a passenger sitting on

the 15th seat behind the driver, to see what was happening at the front of the Bus. PW3's testimony however was that he was sitting on the same side with the driver and had a vantage point to observe the manner in which the vehicle was being driven. He was not asleep and he could see in front. The evidence of PW3, and that of the 1st Defendant before the Traffic court actually corroborated each other. The driver of the bus testified that he swerved right and then left. It also corroborated the evidence of PW2, the driver of the ill-fated vehicle, "***I saw the vehicle come to my left side of the road - my lane.***"

For a driver coming from Naivasha to Nairobi, that must mean, he was on his left side of the road, and the vehicle was driving fast towards him. Again according to the evidence of the 1st Defendant before the Traffic Court, the maximum speed for his vehicle (*bus*) was 80 KPH. He was doing 60 - 70 KPH. Our road science has not yet reached a stage where we can say at what speed the vehicles collided, but is not too difficult to guess. If the admitted speed of the bus was say 60 KPH, and that of the Pick-Up was 50 KPH, it means the force of collision was at 110 KPH, thus causing extensive damage to the Pick-Up, and no less to the bus.

According PW6 (*in the Traffic Case*), an Inspector of Motor Vehicles, Nakuru Centre, the Pick-Up was extensively damaged, the dash board, engine, gear box, steering mechanism, front and rear axles, front and rear suspension and the body were all extensively damaged and ripped off. He did not note any pre-accident defects, and he certified the Pick-Up as a write off, and issued a prohibitory order on the use of that vehicle.

PW6 also inspected, and noted similar damage to the bus. Steering drag link had been hit and ripped off, the offside cross-member was damaged and twisted, the offside front suspension rim was damaged and disarranged on impact, and line board was ripped off, the offside lower body panel had been damaged, front bumper bar, had been damaged and ripped off. Offside lamp head lamp had also been smashed. Again no pre-accident defects were noted.

Indeed, from the evidence, the recommendation of PW1 with which PW7 (*both in the Traffic case*) was that no one should have been charged as both drivers appeared to share responsibility for the accident.

From the evidence of the motor vehicle inspector in the traffic, and the extensive damage to the pick-up which also caused the death of one of its passengers, Maureen Wanjiru and the evidence of PW3 both in this, and the Traffic Case, it is clear to me the more culpable party for the accident was the driver of the bus and I would apportion to him 80% responsibility of the accident and 20% to the driver of the Pick-up.

Having come to that conclusion, the next question is the consideration of damages payable. In this regard both Mr. Mboga and Mr. Murimi gave written submissions on the quantum.

Mr. Murimi suggested an over all figure of Ksh 370,000/= to comprise **(a) Pain Suffering Kshs 10,000/= (b) Loss of Expectation of life Ksh 60,000/= and lost years of Ksh 300,000/=.**

On his part Mr. Juma suggested a global figure of Ksh 6,195,000/= comprising, (*Pain and Suffering Sh 130,000/=, Loss of Expectation of life shs 150,000/=, Funeral Expenses Shs 15,000/= and lost years (Ksh 6,000,000/=)*).

I have considered these submissions along with the authorities cited by both counsel. I think the global figure suggested by the Defendants' counsel is too low, and that by the plaintiff's counsel is too high.

The principal difference here is the multiplicand for the lost years. Mr. Juma, counsel for the plaintiff proposed a multiplicand of 30 years for a 16 year girl who was aspiring to be a lawyer, and who would earn Sh 50,000/= per month, and grant the parents at least $\frac{1}{3}$ of the earnings and thus make a figure of Ksh 6,000,000/= ($@50,000 \times 12 \times 30 \times \frac{1}{2} = 6,000,000/=$).

On his part Mr. Murimi counsel for the Defendant urged a conservative figure of Shs 300,000/= @ sh 3,000/= per month for a period of 25 years - @Ksh 3,000/= x 12 x 25 x 1/3 = 300,000/=.

Counsel for the Defendants submitted that the deceased had poor grades, and was attending a District School, and the chances of becoming a lawyer were remote, and an expected salary of Shs 50,000/= was also remote. I agree with Mr. Murimi's submissions, but a figure of Shs 3,000/= would be again too low. I would suggest a figure of Kshs 10,000/= for a period of 30 years. This would work out at Shs 1,800,000/=. The Fatal Accidents Act (*Cap. 32, Laws of Kenya allows the award of funeral expenses*).

I would award the plaintiff funeral expenses of Shs 15,000/=.

The total sum awarded to the plaintiff would thus be Kshs. 1,556,000/= made up as follows -

A.	(1)	Pain and suffering before death	=	Sh	30,000/=
	(2)	Loss of expectation of life	=	Sh	100,000/=
	(3)	Funeral expenses	=	Sh	15,000/=
	(4)	Lost years	=	Shs	<u>1,800,000/=</u>
					1,945,000/=
B.		Less 20% contributory negligence	=	Sh	<u>389,000/=</u>
					<u>1,556,000/=</u>

The Plaintiff shall also have the costs of this suit.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 24th day of June 2011

M. J. ANYARA EMUKULE
JUDGE