



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 397 OF 2001

DAMARIS WANJIRU MUHORO (*suing as the legal representative of the estate of JOHN MUHORO MBUGUA*).....PLAINTIFF

VERSUS

JOSEPH KAMAU NJOROGE.....1ST DEFENDANT
EVEREST ENTERPRISES LIMITED.....2ND DEFENDANT

AND

JANET KIHARA.....3RD
PARTY

JUDGMENT

By a Plaint dated 30th October 2001 and filed on 29th November 2001, the plaintiff prayed for -

- (a) General damages,
- (b) Special damages,
- (c) Costs of the suit,
- (d) Interest on (a), (b) and (c) above at court rates,
- (e) Any other relief the court may deem fit and just to grant.

The Plaintiff's case is that on or about 11th day of December, 1998, the deceased (*one John Muhoro Mbugua*) was a lawful and fare paying passenger in a Nissan matatu registration Number KAK 251V travelling along the Nyahururu/Ngarua road when at a place called Kwa Wanjiku, the 1st Defendant so negligently and/or recklessly drove, managed and/or controlled motor vehicle registration number KAK 318X Mitsubishi Canter that he caused or permitted the same to violently run into the Nissan Matatu and as a result of which the deceased sustained serious body injuries from which he died two days later, and as a consequence of which the estate of the deceased, the plaintiff and other dependants thereof of the deceased have been put loss, suffering and damage.

The Plaintiff set out the usual particulars of negligence and/or recklessness on the part of the 1st Defendant, and in the end prayed for -

(a) General Damages under the Fatal Accidents Act (*Cap. 32 Laws of Kenya*) and Law Reform Act, (*Cap. 26 Laws of Kenya*) and

(b) Special Damages:-

- (i) Funeral Expenses of Ksh 15,000/=
- (ii) Death Certificate Ksh 100/=

- | | |
|-----------------------|--------------|
| (iii) Police Abstract | Ksh 100/= |
| (iv) Medical Expenses | Ksh 20,000/= |

This is an old matter, and it is unclear why it has taken so long to determine it. The delay in delivering this judgment is regretted.

Before this case was heard, the 2nd Defendant applied for and a Third Party Notice was issued to the 3rd Party, who also filed a third party defence.

THE EVIDENCE

The evidence is quite straightforward. There is agreement that a fatal accident occurred on 11th December 1998. The point of departure is who caused the accident, and who ultimately will be liable to the Plaintiff if at all, in damages and costs.

The 1st Defendant urged that the 3rd Party's driver was the cause of the accident. The 3rd Party's driver, testified that the 1st Defendant was the party to blame for the accident. This was their evidence.

Commencing with the evidence of the 1st Defendant, Joseph Kamau Njoroge testified that he was the driver of matatu Nissan Registration No. KAK 318X, driving at 50 KPH after dropping of passengers at Kwa Wanjiku Trading Centre, when he saw the 1st Defendant's motor vehicle registration number KAK 251V approaching him from the opposite direction and being driven at high speed, and right on his lane. This witness testified that he braked, he hooted, flashed lights in an effort to warn the driver of the Canter, but all to no avail. He testified that due to the short distance of 40 metres a collision occurred, and that both vehicles landed on the right side of the road that is to say, the 1st Defendant's side of the road, that the 1st Driver's motor vehicle suffered damage on its left front side.

On his part, the 3rd Party's driver Mr. Joel Karonji Mwangi testified that it was the 1st Defendant who had moved to his lane, as the latter was negotiating a corner, or bend along the road and that to avoid a head-collision he swerved to his right hand side of the road.

Joel Karonji Mwangi further testified that as he stopped, he was pelted and attacked by youths, and in panic, he drove towards Nyahururu and hit and killed 2 donkeys and his Canter ceased.

None of the parties called an expert as to the cause of the accident. What however is clear is that both vehicles were moving at a relatively high speed in the circumstances so that none of the drivers had sufficient time and room to manoeuvre his vehicle so as to avoid a violent collision in which two people were killed on the spot. A suggestion that either vehicle was moving at a moderate speed is not credible.

The accident occurred at a bend, and the likelihood of a motor vehicle coming from the opposite direction at high speed would be to follow the incline terrain of the road, giving credence to the evidence of the matatu driver that the driver of the Canter was facing his matatu from the opposite direction at high speed would be to follow the incline-terrain of the road, and be on the right and therefore wrong side of the road/lane and the driver of the matatu being on the anti-cline, would be on the left side of the road, and therefore correct side of the road/lane or keeping to his side. Thus confronted with a massive Canter on his side of the road, the immediate and natural instinct would be to swerve to his right - the off side in order to avoid a head-on collision swerves to the right, but not far enough to avoid a hard impact hit by the Canter which causes the matatu to roll, and in the process caused fatal injuries to the two passengers.

There is also no question in my mind that both vehicles were being driven at relatively high speed, but the driver of the Canter coming on the incline of the road at a corner was more to blame. He was so scared that he drove away at an equally high speed and knocked down 2 donkeys which also died on the spot.

On the other hand for the driver of the matatu to over-shoot his swerve to the right (*off-side*), so as to sustain damage on the left of his motor vehicle - i.e. sliding door, also confirms that his speed was far from moderate of 50 KPH or less in a trading centre.

Even though the driver of the Canter was acquitted by the lower court on the offence of causing death by dangerous driving, I would still, for the above reasons find him more to blame for the accident. The 1st and 2nd Defendants\'\'\' (*the Defendants*) counsel submitted that the 3rd Party\'\'\'s witness - Joel Karonji the driver of the Canter, substantially contributed to the occurrence of the accident and urged the court to apportion liability at 40% contribution by the Defendants and 60% contribution by the Third Party. I would respectfully agree with the Defendants\'\'\' counsel submission.

The next question for determination IS what damages to award under the various heads of the claim.

(1) PAIN AND SUFFERING

The deceased suffered serious injuries on 11th day of December 1999. He died 3 days later on 15th December 1998. He had no doubt 3 days of excruciating pain and suffering. The Plaintiff suggesting a figure of Shs. 200,000/=. The Defendants suggested a figure of Shs 50,000/= as reasonable. I think that figure is somewhat low, and compared to the sum awarded in the year 1999 of Shs. 120,000/= and I think a sum of Ksh 150,000/= would be fair.

(2) LOSS OF EXPECTATION OF LIFE

The Plaintiff\'\'\'s counsel submitted that the deceased was full of life at the time of his death, and suggested a figure of Shs 130,000/=. The Defendants on the other hand suggested a sum of Shs. 100,000/=. This is now a conventional figure. I would award the said sum of Ksh 100,000/= on this head of claim.

(3) CLAIM UNDER THE FATAL ACCIDENTS ACT (CAP 32 LAWS OF KENYA)

A claim under the Fatal Accidents Act, essentially relates to Loss of Dependency. This head goes into the inquiry of the deceased\'\'\'s income during his life time. The deceased was 46 years, and operator of a butchery, selling meat, beef, goats, lamb, etc. The Plaintiff put his earnings at Shs 20,000/= per month. There was however no proof of this figure as this businesses are hardly ever subjected to strict accounting, auditing or tax audits. The Defendants suggested a more modest sum of Shs 4,500/= net per month basing their figure upon the Regulation of Wages and Conditions of Employment Regulation (*Legal Notice No. 67 of 1998*) which put the wages of persons of similar occupation such as a tailor, a baker, at about Sh 4,154 - 5,054/=.

The deceased was a self employed person, with a wife and 2 children teenage and 1 child under ten years. I would put his net earnings at about shs 10,000/=.

The deceased was aged 46 years, and as a businessman, he would have worked actively until he was 60 years of age. The plaintiff suggested a multiplier of 14 years. The Defendants suggested a multiplier of 10 years at a retirement of 55 years. I would agree with the Plaintiffs upon the retirement of 60 years, and taking into account the vagaries of life, a multiplier of 14 years would not be unreasonable.

Taking therefore an income of Ksh 10,000/= less one third he is expected to have spent on himself, for a period of fourteen years, the loss of dependency would work out as follows -

$$\text{Ksh } 10,000 \times \frac{2}{3} \times 14 \times 12 = 1,120,000/=$$

SPECIAL DAMAGES

Special damages relate what the Fatal Accidents Act refers to as funeral expenses, which are recoverable. These expenses are not defined, but in my humble view include all expenses directly (*but not remotely/connected with the deceased\'\'\'s burial*). These include, hospital bills, burial expenses, such

as post-mortem, costs, coffin, transportation, and Police Abstract Report, Death Certificate and similar expenses.

The Defendants Counsel suggested a figure of Shs 24,200/=. The Plaintiff claimed Sh 15,000/= but proved Shs 11,000/=. Apart from a death arising from an accident few mourners keep what may be called an accurate mathematical table of expenses. In the circumstances an all inclusive figure of Shs 30,000/= would be reasonable.

CONCLUSION

In summary therefore, I would award the Plaintiff the sum of Ksh 1,300,000/= made up as follows

-

<u>ITEM</u>	<u>SUM KSH</u>
(1) Pain and Suffering	Ksh 150,000/=
(2) Loss of Expectation of Life	Ksh 100,000/=
(3) Loss of Dependency	Ksh 1,120,000/=
(4) Special Damages	Ksh 30,000/=
Total	Ksh <u>1,300,000/=</u>

The said sum shall be apportioned as follows:-

(1) Defendants 60% -	Ksh 780,000/=
(2) Third Party 40% -	Ksh <u>520,000/=</u>
Total	Ksh <u>1,300,000/=</u>

The Plaintiff shall also have the costs of this suit, to be similarly apportioned in similar proportions. The said sum shall carry interest at court rates from the date hereof until payment in full.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 3rd day of June 2011

M. J. ANYARA EMUKULE
JUDGE