



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 113 of 2007

MUASYA MBUVI KISELI (suing as Legal Representative of the estate of the late

PETER MUTISYA MUASYAPLAINTIFF

VERSUS

1. MARTIN MUTISYA KIIO

2. MAXMILAN M. MBITHI.....RESPONDENTS

JUDGMENT

1. Peter Mutisya Muasya died on 22.12.2004 at 4.20 pm when he was involved in a road traffic accident along Machakos-Kitui Road involving motor vehicles registration numbers KAP 631G and KAM 925T. In the Plaint dated 7.12.2007 and filed on 17.12.2007, it is alleged that the accident and demise of the deceased were caused solely by the negligent actions of the 1st Defendant, Martin Mutisya Kiiio and the particulars of negligence are listed as being that he ;

“a. Drove the said motor vehicle registration number

KAP 631G in an aggressive, careless manner and/or in excessive speed, contrary to the traffic regulations.

b. Failed to take any steps to stop , break, steer, slow down or otherwise maneuver the said vehicle so as to avoid colliding with another motor vehicle registration number KAM 925T so as to prevent and/or avoid the said accident.

c. Drove the said motor vehicle without reasonable care or concern for the safety of the passengers lawfully travelling in the said motor vehicle

d. Failed to heed to the traffic rules under the Traffic Act.

e. Failed to take reasonable precaution, care and concern when driving along the said road.”

2. It is also alleged that the 2nd Defendant is vicariously liable for the negligence of the 1st Defendant who was at all material times, his servant and/or agent acting under his instructions and for his own purposes and gain.
3. In the Complaint, filed by the deceased’s father and legal representative, Muasya Mbuvi Kiseli, special damages of KShs. 25,910/= and general damages as well as costs and interest are sought.
4. In the Statement of Defence dated 18.2.2008, the Defendants deny the allegations of negligence and deny that the deceased was a passenger in motor-vehicle registration number KAP 631G and deny that the negligence of the 1st defendant caused the demise of the deceased. In the alternative, they also aver that the said accident was occasioned by the negligence of the driver of motor vehicle registration number KAM 925T Trailer ZB 8538. The particulars of negligence of the unnamed driver of that motor –vehicle are said to be;

“a. Driving without observing due care and attention;

b. Driving at an excessive speed, in the circumstances

c. Failing to swerve and/or in any other way control the said motor vehicle to avoid the accident

d. Driving or onto the wrong side of the road;

e. Driving the said vehicle contrary to the Traffic Act, the Traffic Rules and the Highway Code.”

5. The Defendants then pleaded that they were going to enjoin the said driver as a third party to the suit but I see that there is no such attempt on record.
6. When the matter came for hearing before me, only the Plaintiff called evidence and in her evidence, Sylvia Muthina Mutisya produced the limited grant of letters of administration issued to the Plaintiff (P. exhibit 1), the deceased’s death certificate (exhibit 2) and the search certificate showing that the owner of motor-vehicle registration number KAP 631G was the 2nd Defendant. She also produced the deceased’s payslip for December 2004 showing that the deceased was an employee of Sametract (Cassini and Tonolo) Ltd. and had a net pay of KShs. 21,020/=. Later, advocates for the parties agreed to produce by consent receipts for KShs. 14,900/= being the sums paid for post- mortem, storage and transport of the deceased’s body for burial.
7. The other witness for the Plaintiff was No. 77247 P.C. Robert Tomno who produced the Police Abstract (P. exhibit 9) and the proceedings and judgment in Machakos CM’s Court Traffic Case No. 25/2004 where the 1st Defendant was convicted and sentenced to serve 7 years in prison on each court for the multiple counts of the offence of causing death by dangerous driving. One of the victims was the deceased in this case.
8. I have read the submissions filed by the advocates for the parties and having read the evidence on record, it can only be my conclusion that on liability, the evidence tendered by the Plaintiff is un-controverted and taking into account the evidence in CM’s Traffic Case No. 25/2004 (Machakos) and the judgment in it, the 1st Defendant was

negligent and is wholly to blame for the accident and subsequent death of the deceased. The Defendants did not call any evidence to point towards liability on the part of the 3rd Party truck's driver and so I hold the Defendants 100% liable for the accident, the 2nd Defendant vicariously so.

9. On quantum, I note that on special damages, although Kshs. 25,910/= was claimed, only Kshs. 14,900/= was strictly proved and so I shall award that sum.
10. On the heading "***Pain and Suffering***" the deceased died on the spot according to the evidence on record and although the advocate for the Defendant says that no award should be made on this heading and the advocate for the Plaintiff suggests Kshs. 100,000/= as fair and adequate compensation. I take the view that whereas a zero award is unfair, Kshs. 100,000/= is on the higher side and as is the general practice lately, Kshs. 10,000/= is reasonable because instant death does not mean no pain at all. Kshs. 100,000/= would have been adequate had he stayed alive for some time before death- **see** for example David Mukii Mureka vs Richard Kanyago & Another HCCC 78/2000 (Nairobi) where the said sum was awarded since the deceased died five days after the accident.
11. On the heading "***loss of expectation of life***", the deceased was 56 years old and I agree that although he was in employment, he was heading towards his last years and so I agree with the holding in Hellen Muhonja vs Peter Tituka HCCC 3723/1990 (Nairobi) and as Proposed by the advocate for the Defendant that a conventional figure of Kshs. 100,000/= is adequate compensation in that regard.
12. Regarding the heading "***Loss of Earnings***" it is agreed that the deceased earned Kshs. 21,020/= net, and was 56 years old. I refuse to accept the gross pay of Kshs. 31,845/= proposed by the Plaintiff. What is to be used is the take home pay per month and not inclusive of deductions thereof. As for the lost years, the retirement age has now been raised by statute to 60 years and the deceased was working in the "***workshop***" of Sametract (Cassini & Tonolo) Ltd. I doubt that anyone in a workshop whatever his duties would have worked upto 75 years as proposed by the Plaintiff. I will use the multiplier of 4 in this case and I agree with the decisions in Kellen Kimani vs Waweru Macharia HCCC 2608/98 in that regard.

13. In the event, the award under this head shall be;

$$21,020 \times 4 \times 12 \times \frac{2}{3} = 672,640/=$$

14. I shall therefore enter judgment as follows:-

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|-----|-----------------------------|------------------|
| i. | Lost Earnings | -Kshs. 672,640/= |
| ii. | Loss of Expectation of Life | -Kshs. 100,000/= |

iii.	Pain and Suffering	-Kshs. 10,000/=
iv.	Special Damages	-Kshs. 14,900/=

Kshs. 797,540/=

Less Damages under the law Reform Act Ksh. 100,000/=

Kshs. 697,540/=

15. The Plaintiff shall have that sum plus costs and interest.
16. Orders accordingly.

Isaac Lenaola

Judge

Countersigned and delivered at **Machakos** this **23rd** day of **April 2010**.

H.P.G. WAWERU

JUDGE