



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 60 of 2003

MARY KINA (*suing as the personal representative of the Estate of*

SALESIO DIONISIO NJAGI (Deceased)PLAINTIFF

VERSUS

NENENGAI OIL REFINERIEES LTD.

JOSEPH MATHENGE NGUYODEFENDANTS

JUDGMENT

The plaintiff sued in her capacity as personal representative of her husband Salesio Dionisio Njagi (deceased) she was issued with a grant of letters of administration on 3/4/2003. she pleads that on or about 30/4/2002 the deceased was lawfully driving motor vehicle No. KVJ 525 Toyota Pick-up along Embu- Runyenjes road at Kiangima Secondary School when the second defendant being the first defendant's driver, so negligently drove, managed and/or controlled motor vehicle registration No. KAB 848 L Isuzu Lorry that the second defendant caused the vehicle KAB 848 L to collide with the deceased's vehicle No. KVJ 525 as a result of which the deceased suffered fatal injuries of which he died.

The particulars of negligence are stated in the plaint. It is also pleaded that at the time of death the deceased was aged 32 years and was working as a teacher earning Kshs. 31,512/= per month, was married to the plaintiff and had two children then aged 6 years and 5 years respectively.

At the trail PW1 was eye witness. On material date he was traveling on a bicycle from a feeder road towards the main Embu/Meru road. He was about to cross the main road when he saw a lorry towards Meru from Embu and another vehicle KVJ 525 was coming from opposite side on the other side of the road. He had a crashing should. The lorry lost control. The pick up was on the right side, lorry left its side and moved to other side of the road. The witness said he saw what happened and it was not true that the pick up bonnet opened up.

Also it is denied that the vehicle was moving in zig zag manner. He said two persons died and that a matatu took the injured to hospital including the driver. The accident happened at about 1 p.m. and he witnessed it. The accident happened at about 1 p.m. and he witnessed it. The wife of deceased also gave evidence as PW2. She was informed of the accident and she rushed to where the accident had occurred. There she found KAB 848L, the deceased's vehicle KVJ 525 had towed to police station. She got her friend Nyaga to take photographs of the lorry. She identifies the photographs in court. She visited the Embu Provincial General Hospital where she found her husband admitted. He died that night.

PW3 was the witness who took photographs exhibited "MFI" by PW2. He was a teacher and on 30/4/02, his colleague was involved in an accident. He took the photographs at the scene. When cross-examined he confirmed that he had negatives. He took them after about 2 hours and he was not able to take photographs of the small car as it had been towed away. The photographs were produced and marked PEX 2A-F.

For the defendants, a joint statement of defence was filed. They denied that the vehicle KAB 848 L was owned by the first defendant and that the second defendant was his driver/servant or employee. However, at the trial DW 1 was the second defendant and he admitted that he was a driver of Menengai Oil Refineries Ltd., the first defendant. He admitted that on 30/4/2002 he was driving vehicle KAB 848 L here in Embu. From Embu to Runyenjes and was accompanied by his turn boy Joseph Karanja Mwangi. He saw a small vehicle from Runyenjes (Meru side).

The small vehicle was speeding. It lost control. Then the bonnet opened up. The vehicle came and hit the lorry on front side, then hit vehicle on the left side, then his vehicle (lorry) left the road and moved to the right. The small car did not overturn. There was a matatu coming behind him. That must be the matatu that carried the injured to hospital. He added that he was present when the police came to the scene. He also mentioned that there was an inquest. He denied having caused the accident.

After being shown the photographs he said that his vehicle (lorry) was hit on the left side. It had lost control. The tyre had come off. Where the vehicle was stopping. He admitted the vehicle was heavy and went on the right. The axle moved to the "our right". DW2 was turn boy Joseph KARANJA Mwangi. He saw another vehicle coming down spending the bonnet flew up "our axle left and rolled to our right". The driver could not control the vehicle. The vehicle moved off the road. Other vehicle moved towards left"

On cross-examination he said they were moving at 30 k.p.h. it was a narrow space tyres had skid marks. DW3 was a private investigator. Before this incident he was a police officer. On 13/5/2002 he was given instructions to investigate an accident which occurred on 30/4/2002 on Embu/Runyenjes road. He visited the scene on 17/5/2002 about 3 weeks after the accident. At the police station after inquiry he was informed about the whereabouts of the scene. He went there and took photographs. He talked of impact and point of impact as he took photographs. He took photographs at police yard. He made a report and handed it to insurance company.

On cross-examination he said his name does not appear anywhere on the report. He is not the maker of the report. He was not present when the accident occurred. He did not take photographs when the vehicles were at the scene. He photographed the vehicle several days after at Embu police station. The report says that the photographs were taken at Nakuru in the premises of the first defendant. And this witness got all information from Embu police file. That was the evidence of defendants.

The first issue to be considered is that of liability. In civil cases a plaintiff is expected to prove the case on a balance of probabilities. The main witness of the plaintiff was an eye witness. He saw the vehicles, the lorry and the pick up. There was a slope. This was confirmed by defendant's witness and that the vehicles were coming from opposite directions. It is to be noted that the defendant's lorry was loaded and bigger in size than the small vehicle "pick up".

The driver of the lorry was in a better position to view the scenery. It was a narrow place as the turn boy said. If it is not true that pick up with an open bonnet and traveling in zig zag manner was approaching his lorry, the second defendant should have easily managed to stop the lorry and avoid the accident. In any case the pick up (small car) would not be speeding when moving zig zag.

Furthermore, the evidence of the investigator DW 3 is not acceptable. He said he visited the scene on 17/5/023 weeks after the accident and at that time the vehicles were not on site. The report and sketch he produced were of the alleged scene and were not proved. His evidence was hearsay.

The photographs were taken at the police station and in Nakuru premises of first defendant and he is not the person who made the report which was submitted to the insurance company, the insurer of the lorry.

The scene is shown clearly in the photographs shown by PW3 Mr. Nyaga who took the same about 2 hours after the accident. It is clear the accident occurred on the right side of the road on the lane the deceased was reveling from the opposite direction.

The defendant counsel cited the case of **prown & another vs. Thompson 1968 2 All E.R.** a passage:

“it is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law but of proportion, of balance and relative emphasis and of weighing different considerations. It involves individual choice or discretion as to which there may well be a differences of opinion by different minds”.

This was in support of his proposal that the court should give consideration when assessing the blameworthiness of the two drivers and find that the deceased was to blame wholly or at least 50%.

I have considered the circumstances and the strength of evidence on each side and I find the 2nd defendant (driver) of the lorry to blame 100% and therefore the first defendant is vicariously liable 100%.

The second issue is the question of damages. The plaintiff claims special damages at shs. 100/=. She produced police abstract serial No. 547380 dated 28/7/2003. the form clearly shows that the charge for issue of form is Kshs. 100/= which is allowed.

The claim of death certificate in the sum of Kshs. 150/= is also allowed. The claim for funeral expenses is not supported by documents but the courts of this country do acknowledge that whenever there is death, expenses are incurred in accordance with customary practices of the people of this country. A reasonable sum is therefore allowed in the sum of Kshs. 8,000/=.

Regarding general damages – loss of dependency, the deceased was 32 years old at the time of death. The counsel for plaintiff proposes a multiplier of 25 years based on the remainder of active life of a teacher. The defendant proposes 18 years for similar reasons. For the court it is to be said that life is not certain at all, there are illnesses, death and incapacitate that may render a person unable to continue working. The death may have occurred before any proposed expectancy has expired. Therefore, I assess the multiplier at 20 years.

Regarding the issue of funds available for dependency the deceased was earning a gross Kshs. 31,512/=. There were statutory deductions:

P.A.Y.E Kshs. 3,999/=

Others: health Kshs. 280/=

Union dues Kshs. 272/=

Others Kshs. 272/=

Kshs. 4,822/=

Leaving a balance of available funds to the deceased at Kshs. 26,689/= out of which he could have allowed his family 2/3. the dependency is therefore $Kshs. 26,689 \times 12 \times 2/3 = 4,274,240$.

Regarding the damages under Law Reform Act the estate is entitled to loss of expectation of life which I award at Kshs. 150,000/=. For pain and suffering, the evidence is that the deceased lost his life the same night of the accident. Therefore, a normal sum of Kshs. 10,000/= is awarded.

In the circumstances, the award in damages is as follows:

Special damages	Kshs. 8,250
Loss of expectancy	Kshs. 150,000
Pain and suffering	<u>Kshs. 10,000</u>
Total	<u>Kshs. 168,250</u>
Dependency	<u>Kshs. 4,274,240</u>
Grand Total	<u>Kshs. 4,442,490</u>

The plaintiff shall have interest on decretal sum from the date of judgment at court plus costs.

DATED this 9th day of February 2009.

JOYCE N. KHAMINWA

JUDGE

DELIVERED this 9th day of February 2009.