



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

CIVIL SUIT 41 OF 2005

WESLEY KIPYEGON MUTAI (*suing as personal representative of the
estate of CHARLES KIPKOECH MUTAI (DECEASED)*)..... PLAINTIFF

VERSUS

KIPKELION TOWN COUNCIL1ST DEFENDANT

SAMWEL KOSKEI CHERUIYOT2ND DEFENDANT

JUDGMENT

I: Procedure

1. Two defendants, being M/S Kipkelion Town Council and Samwel Koskei Cheruiyot are sued herein by the estate of the deceased one Charles Kipkoech Mutai for unlawfully causing his death.
2. Samuel Koskei Cheruiyot is an employee/driver to the Kipkelion Town Council who own motor vehicle registration KWE 134 Nissan Lorry.
3. The plaintiffs alleged that due to the driver's negligence he knocked down Charles Kipkeoch with his vehicle causing him fatal injuries.
4. Samuel Koskei Cheruiyot applied for 3rd party proceedings to enjoin the then town clerk. This was on the 31st January, 2007. Alternative service was granted to be effected upon the said town clerk known as Shadrack B. Kibet Koroo. He failed to enter appearance. Directions was given on 3rd October, 2007 that the trial proceeds against all three defendants.
5. The case was originally being handled by Musinga J who commenced the trial and heard the plaintiff's witnesses. The defence case was commenced under **Order 17 r 10** Civil Procedure Rules (*being at the stage from where it had been left as the Hon. Judge was no longer at the station in Kericho*).

II: Facts

6. The facts of the case before me is that PW2 Wesley Kipyegon Mutai, a brother to the deceased, was on the 7th September, 2004 walking home with the deceased. They were coming from Chepseon Market at about 9.00p.m.

7. Suddenly, a motor vehicle lorry registration number KWE 134 Nissan Lorry having no lights came from behind. They moved off the road but the vehicle went off the road and hit his brother. His brother died instantly.
8. PW2 ran to the police but the police did not come to the scene until the following morning to remove the body of the deceased.
9. It was the evidence of PW2 that he found the vehicle registration KWE 134 belonged to the town council of Kipkelion. The 2nd defendant was its driver who was accordingly charged in a court of law and was fined Kshs. 17,000/= in default 2 years imprisonment on his own plea of guilty.
10. In his defence the 2nd defendant stated that it was true he was the driver working with the town council of Kipkelion at all times he had driven the motor vehicle in question being registration KWE 134.
11. On the material day he had parked the vehicle when he had done so the then town clerk came at night to him and requested that he goes to his premises to collect timber. The clerk Shadrack B. Kibet Koroo gave him those orders that he was not able to disobey.
12. They went and collected the timber which was delivered at night to the town council.
13. On cross-examination the driver, defendant No. 2 admitted that he pleaded guilty to a traffic offence of causing death by dangerous driving. He was fined in Resident Magistrate's Court Traffic file 1006/04 to a sum of Kshs. 17,000/= in default to serve two years imprisonment. He paid the fine.
14. He also admitted that at the time he drove the vehicle he had not filled any work ticket nor had he sought permission to drive out of hours.
15. The town council called its representative (DW2) and said it duly confirmed that the said vehicle had left its premises without its authority but the blame was placed upon the town clerk Shadrack B. Kibet Koroo who should be made liable for the accident.
16. The said Shadrack B. Kibet Koroo was not present during the trial and failed to defend his case even on being given that opportunity.

III: Liability

17. Parties filed no agreed issues. I would find that the issue before me is whether the defendants are liable to the said accident?
18. The master has a duty of care over his servant and is vicariously liable for such actions. The case before me clearly has been established, that the deceased death was caused as a result of the motor vehicle lorry being driven by the 2nd defendant, having no lights veering off the road and knocking down the deceased.
19. The vehicle never stopped.
20. By his admission in the witness box the 2nd defendant admitted he caused the accident and was duly fined Kshs. 17,000/= in default two years imprisonment.
21. I would accordingly compute liability against the defendant.
22. The defendants 1 and 2 ask me to find the 3rd party wholly to blame for the accident. It was his unlawful authority of having the 2nd defendant drive the vehicle without head lights, in the dark to carry materials that did not belong to the town council. His actions were illegal and he should have been blamed.

23. The 2nd defendant should have disobeyed the illegal request to carry goods at night more so when he knew the vehicle had no lights. To this, he is to blame. The town council, as the master is also to some extent liable as they had a vehicle having no head lights.

24. I would apportion liability as follows:-

Defendant 1 and 2 - 20% liability jointly and severally

3rd party 80% Liability

IV: Quantum

I. General Damages

i) Fatal Accident Act

25. The widow to the deceased and PW2 are administrators of the estate. I am satisfied that they have locus to bring this case before me.

26. PW1 – the widow stated they had four (4) children. The plaintiff had pleaded only three (3) children. The deceased also had two (2) parents. I will come back to this part later.

27. PW2 informed the court that both the deceased and he were business persons. They had no records to show the court. They sold timber. I have in the past used as a multiplicand 3,000/= per month being the average minimum wage for Kenyans which I accordingly adopt.

28. At the time of death the deceased was aged 40 years old. The average retirement age for Kenyans is 55 years. I would safely use 15 years as the multiplier.

29. Under the **Fatal Accident Act** I would compute the claim herein as

Kshs. 3,000/= X 15 years X 12 X 2/3 = Kshs. 360,000/=.

ii) Loss of Expectation of life.

30. I award the comential sum of Kshs. 70,000/= for loss of expectation of life.

iii) Loss of earning/earning capacity.

31. This claim was abandoned.

iv) Special Damages

Nil. Not proved

v) Pain and suffering – Nil

32. Death was instant.

33. I am required by law to apportion the sum of Kshs. 360,000/= amongst the dependant. PW2 and the son Denis Kipkoeh are not entitled to this claim as one is a brother and the other an adult son at the time of the accident. Those who qualify under the act are the widow, children, and the parents.

Rosaline Mutai – widow

Kshs. 100,000/=

Denis K. Koech – Nil (*18 years in 2004*)

Judith Cherono – daughter (*16 years in 2004*)

Kshs. 100,000/=

Benard Kibet son (*14 years in 2004*)

Kshs. 100,000/=

Grace Murei – mother

Kshs. 30,000/=

Walter Kipterer Nyagusei – father

Kshs. 30,000/=

Total **Kshs. 360,000/=**

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34. I order that if the children are still minors at the date of this judgment, then the sum be invested in a joint account with the two administrator/administratrix and in the name of the deputy registrar with the Kenya Commercial Bank Kericho fixed deposit account. Judgment is entered in favour of plaintiff.

35. **In summary**

35.1. Fatal accident

35.2 Male adult age 40 years old in 2004.

35.3. Liability

20% against Defendant 1 and 2

80% against 3rd party

Quantum

35.4. **Loss of expectation of life**

Kshs. 70,000/=

to be paid to the estate

35.5. **Special damages**

Nil not proved

35.6. Law Reform Act

Taken into account.

35.7. Apportionment under the Law Reform Act as above

35.8. Fatal accident

Kshs. 360,000/=

Kshs. 430,000/=

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36.I award the costs of this suit to Plaintiffs 1 and 2 as approved. I award interest from the date of this judgment on General Damages.

DATED this 5th day of February, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

I.O. Meroka advocate instructed by M/S Meroka & Co. advocates for the Plaintiff – present

W.R. Kiprono advocate from M/S W.R. Kiprono & Co. advocates instructed to hold brief

for M/S Ojienda & Co. advocates for the Defendants - present