REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

HCCC 187 OF 2007

1. LEONARD MWASHUMBE SHINGA &

2. MAUREEN MWASHUMBE (*Suing as legal representative of estate of the late)*

KELVIN SHINGA MWASHUMBE ..... PLAINTIFFS

V E R S U S

1. AUTO SELECTION (K) LIMITED

2. SAMUEL NYAIRO ONGUSO ..... DEFENDANTS

J U D G M E N T

The plaintiffs are the holders of a limited grant of letters of administration *ad litem* for the estate of Kelvin Shinga Mwashumbe who was a son of the 1st plaintiff and a brother of the 2nd plaintiff. He died on 18th March, 2005 out of injuries sustained in a road traffic accident on 10th March, 2005. It was alleged that he was hit by a motor vehicle registration No. KAS 807W along Abdel Nasser road near the Coast General Hospital junction in Mombasa town.

The suit was filed on 17th August, 2006. The plaintiffs alleged that at all material times, the 1st defendant was the registered owner of motor vehicle registration No. KAS 807W while the 2nd defendant was the beneficial owner thereof having entered into an agreement with the 1st defendant to purchase the said motor vehicle. The plaintiffs' case that the accident occurred as a direct consequence of the negligence of the defendants' driver and/or agent for which the defendants are jointly and severally vicariously liable. Six acts of negligence are particularized in paragraph 9 of the plaint.

As a result of the accident, the plaintiffs state that they incurred special damages quantified in the plaint at Kshs. 427,398/-. They also state at the time of the accident, the deceased was enjoying good health and was gainfully employed at Emirates Sky as a Cargo Assistant at a monthly salary of the equivalent of Kshs. 41,700/-. He was survived by his father, two brothers and two sisters, to whom he used to remit a monthly sum of Kshs. 10,000/- for their upkeep.

Each defendant filed a separate defence. In its defence, the 1st defendant denied that the plaintiffs had any authority to sue on behalf of the estate of the deceased, and further denied that the estate of the deceased had any interest or claim in the suit against the defendant as it was a stranger to the suit. The 1st defendant also denied that it was the owner of motor vehicle Reg. No. KAS 807W and stated that it was a

motor vehicle dealer and that at the material time it had sold the motor vehicle Reg. No. KAS 807W to the 2nd defendant on 22nd October, 2004. It also denies that the accident occurred on the date and in the manner alleged or at all and denies the particulars of negligence. It finally denies the particulars of special damages and avers that if the accident occurred, it was caused wholly or largely by the negligence of the deceased. It then particularizes four acts of negligence and prays that the case be dismissed.

The 2nd defendant adopts the stance taken by the 1st defendant save for admitting the ownership of the motor vehicle Reg. No. KAS 807W which he admits having bought from the 1st defendant.

Several issues arise from these pleadings. The main ones are-

1. *Do the plaintiffs have authority to sue on behalf of the estate of the deceased?*

2. *Did an accident occur on 10th March, 2005 in the manner pleaded by the plaintiffs?*

3. *If so, did the deceased suffer fatal injuries?*

4. *If he did, did his estate suffer loss and damage as pleaded in the plaint?*

5. *If an accident occurred on the material date, who is to blame for it?*

6. *What should be the order as to costs?*

Issues 1 to 4 are easily answered in the affirmative, but not for issue five. Where a road traffic accident involves a motor vehicle and a pedestrian, the parties to blame would be either the driver, or the pedestrian, or it may be that each of them is partly to blame. In order to be able to adjudicate on who is to blame, the court requires evidence on how the accident occurred. In the absence of such evidence, the court would not be able to adjudicate. In the instant case, the plaintiffs allege that the accident was caused by the defendants' driver and particularize 6 grounds of negligence which led to the accident. In our legal system, it became imperative for them to prove any of those grounds in order to succeed. Such proof would have to be by way of evidence.

The first plaintiff gave evidence in which he said that the first report he got about the accident was from the nurses, then from the police, and also from the driver. He admitted that he was not personally at the scene of the accident, nor were the nurses. However the police went to the scene of the accident after the deceased was taken to hospital, and the driver told him that he was the one who had knocked down the deceased. PW 2, Inspector Ali Ngoni, told the court that he took up the investigation of this matter and recorded all the statements of all the witnesses. In sum, he told the court that the deceased was crossing the road, and when he was trying to avoid being hit by the matatu, that was when he was hit by motor vehicle registration number KAS 807W. "*He must have been trying to walk away from the matatu*," the witness said. In conclusion, Inspector Ngoni said that it was not clear from the statements of both drivers as to what exactly transpired, and so he recommended an inquest, and the State Counsel agreed with him. The driver of KAS 807W was not charged with any offence, and instead of waiting for the outcome of the inquest, the plaintiff's opted to prosecute this suit. If they had waited for that outcome, it is probable that they would have gathered more information as to how the accident occurred, and that would probably have shed more light on who was in the wrong, especially seeing that the defendants chose not to adduce any evidence on the incident.

Against that background, I find that the onus of proving negligence lay on the plaintiffs. The mere fact that a motor vehicle has been involved in an accident with a pedestrian does not, ipso facto, mean that the driver was automatically to blame. It is probable that the pedestrian was himself to blame, and equally probable that each of them contributed to the accident. Confronted with a similar situation in GRACE KANINI MUTHINI v. KENYA BUS SERVICE LTD & ANOR Nairobi HCCC No. 4708 of 1989, Ringera J, as he then was, said-

"... Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, I must, not without a little anguish, dismiss the plaintiff's suit on the ground that fault has not been established against the defendants ..."

Establishment of fault is, indeed, a pre condition to the finding of liability in our legal system. In KIEMA MUTHUKU v. KENYA CARGO HANDLING SERVICES LTD (1991)2 KAR 258, Omolo, Ag. JA, as he then was said at page 261, a statement with which the other members of the bench agreed, that-

"... it was for the appellant to prove, of course on a balance of probability, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault. The appellant clearly failed to prove any sort of negligence against the respondent and in my respectful view his claim was rightly dismissed ..."

Although this statement was made in relation to an industrial as opposed to a road traffic accident, in FLORENCE REBECCA KALUME v. COASTLINE SAFARIS & ANOR. Mombasa HCCC No. 166 of 1995, Waki J., as he then was, observed that the ratio decided in Muthuku's Case (supra) was so widely phrased that it would cover all manner of actions based on negligence.

In view of the foregoing, it is my humble view that the doctrine of *res ipsa loquitur* does not apply. I am constrained to dismiss the plaintiffs' suit on the ground that fault has not been established against the defendants.

If I am wrong in so finding, it behoves me to assess the amount of damages I would have awarded if I had found for the plaintiffs. In that context, the evidence was that the deceased was aged 29 years. He was employed by Emirates as a Cargo Junior Assistant and his gross salary as at February, 2005, (Exh 9) was Dhs 2191 (Dirhams Two Thousand One hundred Ninety One) which translates approximately to Kshs. 43,820/- per month. Since he was taking home a sum of Kshs. 10,000/- per month, that left a gross of Kshs. 33,820/-. For the purpose of computing the loss of dependency under the Fatal Accidents Act, we would have to go by the net earnings which I would compute at two thirds of the gross. The death certificate shows that at the time of his death, the deceased was 29 years old. His engagement with the Emirates was on contract for a period of three years commencing from 1st June, 2004. Thereafter the contract would be reviewed by the company and might be renewed on mutual agreement, but without any obligation on the company to renew. In such circumstances, one may not be certain what the future would have had for the deceased, and I think it would be reasonable to allow a multiplier of 20 years.

On the basis of the authorities cited by respective counsel for both sides, I would also allow the sum of Kshs. 150,000/- for loss of expectation of life, and Kshs. 100,000/- for pain and suffering. As for special damages, the plaintiff claimed a total of Kshs. 427,398/- comprising Kshs. 316,791/- by way of hospital bills and the rest on account of funeral expenses. The law and practice governing the award of special damages is that these must not only specifically pleaded, but that they must also be strictly proved. Under Hospital bills, the plaintiff said in cross examination that in order to pay the hospital bills, they organized a Harambee and friends and relatives contributed. He could not tell offhand how much he actually paid from his pocket, but he also said that he took a salary advance of Kshs. 25,000/- and that was the only expense he incurred personally. Although the 1st plaintiff struck the court as a very honest person, and the court believes him when he says that was the amount he expended from his pocket, unfortunately he did not adduce any proof thereof. The only two items he proved were in respect of funeral expenses in which he produced receipts showing that he paid Kshs. 6,500/- for flowers, and Kshs. 25,000/- in respect of transport. But since he had specifically pleaded Kshs. 20,265/- for transport, this is the amount to which he is entitled by way of transport. I would therefore award a total of Kshs. 26,765/- by way of special damages.

In sum, I if I had found for the plaintiffs, I would have awarded a total sum of Kshs. 6,947,405/- computed as follows-

	Kshs.
(a) Loss of dependency	
43,820X12X20X2/3	7,011,200.00
Less 5% on accelerated payments	350,560.00
Sub-total	6,660,640.00
(b) Loss of expectation of life	150,000.00
(c) Pain and suffering	100,000.00
(d) Special damages	36,765.00
TOTAL	6,947,405.00

However, having found that the plaintiffs did not establish fault against the defendants, and that *res ipsa loquitur* was not applicable, it is with a very heavy heart that I hereby dismiss the plaintiffs' suit.

The basic principle of law is that costs follow the event, unless there are compelling reasons to depart from that principle. The plaintiffs here lost their son and brother, respectively, in a cruel and tragic road accident. They were not entirely to blame for the failure to adduce adequate evidence to establish prima facie liability. On the contrary, one can understand their anxiety. In my view, they deserve not only pity, but also sympathy. As Waki J., as he then was, suggested to the defendants in FLORENCE REBECCA KALUME v. COASTLINE SAFARIS & ANOR (supra) I would equally suggest to the defendants in this case to consider offering some ex gratia payment to the plaintiffs on compassionate grounds. Otherwise I make no order as to costs.

Dated and delivered at Mombasa this 13th day of March, 2009.

L. NJAGI

JUDGE